(1) Supreme Court U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT

Petitioner,

v.

A&W INDUSTRIES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
(Volume I)

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QUESTION PRESENTED

The 5th Circuit affirmed a Bankruptcy Court's exception to discharge under §523(a)(6) by collateral estoppel of a state court judgment for civil conspiracy to breach a contract in favor of a creditor who has judicially admitted that the debtor never engaged in either negligent, unlawful or criminal behavior resulting in injury to the creditor. The record shows that that the debtor never had any contractual relationship with or legal duty to the creditor, and could not and did not participate in any action alleged by the creditor to be a conspiratorial act directed toward the creditor. The state court failed to find any illegal act by any alleged conspirator that is a required element of civil conspiracy in Texas. The Bankruptcy Court based its decision on a similarly flawed state appeals court opinion that impermissibly "implied" both facts and damages from the original state court judgment when, under Texas law, such facts and damages cannot be implied.

No case exists in the 1st, 5th, 6th, 9th, and 10th circuits that has held any participant in a civil conspiracy to be non-dischargeable under §523(a)(6). No case exists in any circuit in which a third party with no direct relationship to the creditor has been found to be non-dischargeable under §523(a)(6). Conversely, business and marital partners have been granted discharge when evidence showed they did not participate in their partners' non-dischargeable actions. Further, individuals with direct relationships to creditors have been found to be dischargeable because collateral estoppel has been declared inappropriate, their states of mind were not determined in the trial court, or because the ultimate determination of dischargeability is a federal question. All of these elements exist in this case.

The Bankruptcy Court decision in this case conflicts directly with its own court, decisions in the Northern District of Texas, the Fifth Circuit, other circuits and this Court.

Aside from the public policy issue this case raises of disregarding the specific, and narrow, language of the statute to include debtors who may have no direct relationship with the creditor, this case concerns a single question:

Can a state court judgment debt be held non-dischargeable under §523(a)(6) on the basis of a state court finding of civil conspiracy when the creditor judicially admitted that the debtor did not engage in either negligent, unlawful or criminal behavior resulting in injury to the creditor, and the debtor did not participate in any act claimed by the creditor to have caused the creditor's alleged injury?

LIST OF PARTIES

Appellant certifies that the following persons may have an interest in the outcome of this case:

1. Kenneth A. Goldblatt, Petitioner.
2. Frank P. Hernandez, Petitioner's Counsel of Record.
3. A & W Industries. Inc., Respondent.
4. Frank R. Jelinek, Respondent's Counsel of Record.

CORPORATE DISCLOSURE STATEMENT

Respondent A&W Industries, Inc. is a privately held Texas corporation.

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OPINIONS BELOW

The Bankruptcy Court denied Goldblatt's discharge claim on November 7, 2002. [Appendices H and I] and denied his Petition for Reconsideration on December 6, 2002. [Appendix J] The Order of the District Court affirming the Bankruptcy Court was issued on March 24, 2004. [Appendix K] Goldblatt filed Notice of Appeal on April 11, 2003. [Appendix L] The unpublished, *per curiam* Opinion of the 5th Circuit affirming the Opinion of the District Court was issued on November 4, 2004. [Appendix M]

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Sec. 1254(1) and 2101(c). The date of the last judgment sought to be reviewed is November 4, 2004. The judgment from which Appellant appealed to the Fifth Circuit was conferred by 28 U.S.C. § 158(a)(1). Jurisdiction for Appellant's appeal to the federal district court was conferred by 28 U.S.C. § 158(a)(1) and/or (a)(2). The original matter in the bankruptcy court was a core matter under 28 U.S.C. §§ 157(b)(2)(I) and (J) and 1334.

APPLICABLE STATUTES

Bankruptcy Rule 523(a)(6) states in pertinent part: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – .... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

STATEMENT OF THE CASE

This is a Federal Bankruptcy Discharge case.

Petitioner Goldblatt ("Goldblatt") asserts the Bankruptcy and appeals Courts' clear error in denying his discharge of a factually flawed state court judgment debt.

This case involves four seminal issues:

The first issue is the bankruptcy court's denial of discharge based on collateral estopple of a state court judgment is proper when the findings accompanying that judgment do not support either the original trial court judgment or the requirements of § 523(a)(6). *Shalilesh Gupta v. Eastern Idaho Tumor Institute, Inc.* (*In re Shailesh Gupta*) 2004 WL 2913963 (5th Cir. 2004) indicates collateral estoppel is inappropriate.

The second issue is the Bankruptcy Court's reliance on an unpublished, 88-page state appeals court opinion that is both factually flawed and legally erroneous and inappropriate for collateral estoppel. That opinion [Appendix E] recites conflicting facts that make it legally and chronologically impossible for Goldblatt to have participated in a conspiracy and that court impermissibly and unlawfully "implied" missing facts while quoting the very Texas authority that prohibits it from doing so.

The third issue is the Bankruptcy Court's reliance on Texas law regarding the basis of the disputed debt, rather than applying Federal bankruptcy law principles and authorities as required by existing authority of its own court, its own district, its own circuit, other circuits, and this Court. *Gupta* at [hn. 3] and [¶ 8]. ("the ultimate determination of dischargeability . . . is a federal question.").

The fourth issue is that the 5th Circuit's unpublished, *per curiam* affirmation of the Bankruptcy Court's judgment that conflicts with its own circuit's law and those of other circuits.

STATEMENT OF THE FACTS

In 1985, the president of a Texas corporation, mortgaged real estate and assets of the corporation through a mortgage and deed of trust. [Appendix E, p. 31]. In 1989, a dispute developed between family members, over the ownership of the capital stock of the corporation and the mortgaged assets. The dispute resulted in a lawsuit filed in

Texas' 352nd District Court, where the parties agreed to a temporary injunction to prevent the business or its assets from being sold except as business had been conducted in the past. A&W Industries, Inc. ("A&W") was not a party to the 1989 lawsuit and did not exist as a business entity at the time.

In June 1990 the company president was murdered. [Appendix E, p. 27]. His executors were substituted as plaintiffs in the 352nd Court suit. [Appendix, E, p. 27]. Attorneys for the Estate told the Executors that the company had to be sold to pay Federal taxes, convincing the executors to sell the company's assets to A&W. The representations were false. [Appendix E, p. 28, fn. 2].

Because the Creditor was aware of the 1985 mortgage and the existing lawsuit, it did not purchase the real estate along with the other business assets. Instead, A&W executed a 5-year Commercial Lease Agreement ("the Lease") with the corporation containing an Obligation to Purchase section ("Section 28") providing that, the Creditor would purchase the property for $327,000.00 if the lessor could offer clear title during the lease term. [Appendix E, p. 30]. However, the contingencies of Section 28 were never triggered because the real estate title was never "clear." [Appendix E, p. 34, fn. 4].

During the summer of 1993, A&W declared it was ready to purchase the subject real estate but offered $95,000.00, less than one-third of the originally agreed price. [Appendix E, p. 36]. The Executors refused the offer. A&W stopped paying rent, precipitating notice of default on the note.

The executors discovered the problems caused by the Estate's and WNT's attorneys' malfeasance, fired them, halted the sale process on November 27, 1993 [Appendix E, p. 36], and demanded A&W resume making its rental payments.

In early 1994, a 352nd court party, Shirley Long, filed a new suit against the Executors and the corporation

in the 48th District Court, for breach of the 352nd court judgment. [Appendix E, p. 37]. In February 1994, Executor James Day, contacted Goldblatt to assist the executors in obtaining information regarding the property and to gain his assistance to stop foreclosure. [Appendix E, p. 37]. On February 28, 1994, Goldblatt purchased the mortgage. [Appendix E, p. 38]. On March 28, 1994, A&W sued the Estate and Goldblatt alleging conspiracy to prevent A&W from purchasing the subject real estate by breaching the Obligation to Purchase Agreement contained in Section 28 of the Commercial Lease Agreement of 1991. [Appendix E, p. 38]. The Executors, on advice of their new counsel, notified Goldblatt that they could not meet the mortgage payments because of A&W's lawsuit. Goldblatt responded by notifying them of default and instituting new foreclosure proceedings.

On May 30, 1994, Goldblatt entered agreements with all of the parties to the 352nd court suit to settle all original disputes and defend against A&W's pending lawsuit. [Appendix E, p. 39] These agreements rendered the 48th court judgment moot.

On June 7, 1994, Goldblatt properly and validly foreclosed the note. [Appendix E, p. 41] The Bankruptcy Court erroneously stated that Goldblatt foreclosed on the note because A&W had sued him. His testimony at trial showed otherwise:

> Q. The fact is, you didn't want to do it because you needed to foreclose because you believed it would cut off A&W's claims to purchase, correct?
>
> A. No, sir.

In refusing to alter the 1997 Summary Judgment, the probate judge stated on the record:

> Now, as to the matter of the constructive trust, the Court has wrestled with this issue throughout the trial, and I'm of the belief that in order for the Court to invoke that remedy, there must be clean hands on the part of the party requesting it. And I just find that Ms. Rountree's testimony was so

> lacking, and so lacking in credibility, and that the lease was obviously violated. I think that if they had a lease, they should have been careful to pay the taxes. They should have observed the letter of the lease given the circumstances they were in, and I'm going to deny the constructive trust." [Appendix B, p. 9]

and then stated:

> The Court having previously found that Mr. Goldblatt's foreclosure was valid, the Court will not affect that. [Appendix B, p. 10]

REASONS FOR GRANTING THE WRIT

This is a case of first impression. Goldblatt has found no case in any circuit in which an accused "conspirator" who did not act directly to injure the judgment creditor or who did not have a direct relationship with the creditor has been denied discharge under §523(a)(6). Neither has Goldblatt found any case in which the debtor has been held to be non-dischargeable after the creditor has judicially admitted that it never claimed the debtor engaged in either negligent, unlawful, or criminal behavior that injured the creditor. Yet, both elements are present in the record of this case.

Most circuits acknowledge that §523(a)(6) obligates reviewing panels to construe strictly exceptions to discharge to give effect to the fresh start policy of the Bankruptcy Code. See *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001). But the Bankruptcy and appellate courts below have erroneously sanctioned the application of state law over Federal law when case law authorities require the opposite.

Most important, however, the original decision of the Bankruptcy Court conflicts with holdings in its own district, the 5th Circuit, and other circuits that have considered §523(a)(6), as well as this Court.

In *In re Grisham*[1] the court affirmed that debt arising from debtor's conduct would not be 'malicious' within the meaning of the discharge exception when a debtor has just cause or excuse."[2] In *In re Meece*[3], the court declared that a debt arising from the debtor's infliction of an intentional injury is dischargeable if the debtor had just cause or excuse. The *Meece* court found trial court findings that precluded exception under §523(a)(6) just as the findings do in this case.

The Bankruptcy Court's decision also conflicts with §523(a)(6) 5th Circuit law. In *Texas v. Walker*[4] the panel declared that "[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances" and that the absence of any evidence in the state trial court of the debtor's state of mind [as in this case] required reversal and remand. The *In re Debtor* [*Miller*][5] panel found that the scope of the collateral estoppel doctrine is circumscribed by the particularized findings in the case, reasoning that "the label 'intentional tort' is too elusive to sort intentional acts that lead to injury from acts intended to cause injury," and reversing and remanding for further proceedings. In *In re Cook*[6] the panel agreed that the absence of evidence that Mrs. Cook participated in the activities about which the creditor complained allowed her discharge – even when her husband's discharge was denied under the same facts. The *Cook* panel found that the

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[1] *In re Grisham* (*Mabank Bank v. Grisham*), (N.D.Tex. 2000), 245 B.R. 65, 43 Collier Bankr.Cas.2d 1352.

[2] Although Grisham was decided two years after *Kawaahau*, there continues to be some confusion in the 5th Circuit as to the just cause or excuse defense.

[3] *In re Meece* 261 B.R. 403, 406-407 (Bankr. W.D.Tex. 2001.

[4] *Texas v. Walker*, 142 F.3d 813, 126 Ed. Law Rep. 92 (5th Cir. 1998).

[5] *In re Debtor* [*Miller*], 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998).

[6] *In re Cook*, 169 F.3d 271 (5th Cir. 1999).

creditor had abandoned its objections to Mrs. Cook's discharge in pleadings, just as in this case. In *Hickman v. State of Texas*[7] the panel acknowledged its duty to construe exceptions narrowly in favor of the debtor and limited the scope of the term "willful and malicious injury" to "conduct designed to cause deliberate or intentional injury" and not merely intentional conduct that resulted in injury. The *In re Williams*[8] panel concluded that the provision applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury.

Walker, *Miller*, and *Williams* (and the cases they cite) all involve fact situations in which each discharged judgment debtor was personally involved in a direct relationship with the judgment creditor. In *Cook*, even a relationship of marital partners was not sufficient to overcome the "by the debtor" language of the statute. *Hickman* underscored the requirement to construe the language of the statute narrowly. More important, however, is the fact that after the 5th Circuit panel in this case issued its unpublished, *per curiam* decision, another 5th Circuit panel issued a conflicting opinion holding that the state court findings did not effectively determine the dischargeability of a state court judgment under a similar section of the Bankruptcy Code, saying that "the ultimate determination of dischargeability . . . is a federal question." It pointed out that no "finding" was made in the state court, and, collateral estoppel cannot attach to a non-existent finding." The *Gupta* panel recognized that, "there is no way to tie the damages found . . . back to specific instances of [the debtor's] misconduct that might correlate with Texas's amended statute or the federal standard" and reversed and remanded. See *Shailesh Gupta v. Eastern*

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[7] *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001).
[8] *In re Williams*, 337 F.3d 504 (5th Cir. 2003).

Idaho Tumor Institute, Inc. (*In re Shailesh Gupta*) 2004 WL 2913963 (5th Cir. 2004).[9]

Most important, however, the decisions in this case conflict with those of other circuits.

The 1st Circuit has sorted difference between actions "by the debtor" through two applicable decisions. In *Jones v. Svreck*[10] a panel held that Jones' sexual harassment of Svreck was non-dischargeable because there was evidence showing Jones' actions were intentional and that he intended the injury. It distinguished the *Jones* facts from *Hamilton v. Nolan*[11] in which Nolan was granted discharge because Nolan was not the individual who engaged in the discriminatory treatment. The *Nolan* panel stated that "even if [the perpetrator's] behavior were found to be willful and malicious, this could not be imputed to debtor Nolan."[12] *Nolan* at 731.

In the 6th Circuit, the *In re Trantham*[13] panel found patent infringement action created a non-dischargeable debt because Trantham had no justification for his actions.[14]

A 9th Circuit panel interpreted *Kawaauhau* in declaring that §523(a)(6)'s malicious prong was separate and distinct from its willful prong and characterized a malicious injury as involving "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4)

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[9] See also *In re Moore v. Panalis*.

[10] *Jones v. Svreck* (*In re Jones*), MW 02-44 (1st Cir. 2003)

[11] *Hamilton v. Nolan* (*In re Nolan*), 220 B.R. 727, 730 (Bankr. D.C. 1998)

[12] The panel further distinguished *Jones* from *Voss v. Tompkins* (*In re Tompkins*) 290 B.R. 194, 199 (Bankr. W.D.N.Y. 2003) in which the judgment entered did not indicate that the underlying causes of action in the complaint were valid or had been admitted by the debtor, thus precluding application of collateral estoppel.

[13] *In re Trantham*, No. 03-8010 (6th Cir. 2004)

[14] The Court may find it useful to compare *Trantham* with *Meece*, in which one infringer was found to be non-dischargeable while the other one was discharged.

is done without just cause or excuse." There, a debtor who had the clear ability to pay employee wages, but chose not to pay and inflicted willful and malicious injury for personal benefit. See *Petralia v. Jercich*[15]. The *Carrillo v. Su*[16] panel reaffirmed *Jercich,* holding that the §523(a)(6) willful injury requirement is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." The *Su* panel upheld a BAP reversal of the bankruptcy court because "the subjective standard correctly focuses on the debtor's state of mind and precludes nondischargeability short of the debtor's actual knowledge that harm to the creditor was substantially certain." The *Su* court found the bankruptcy court erroneously "conflated" the "willful" and "malicious" prongs in its §523(a)(6) analysis – just as was done in this case.

In the 10th Circuit, in *In re Moore v. Panalis*[17], the bankruptcy court ruled for Moore, holding that a fraud verdict did not represent a debt for a "willful" injury under §523(a)(6). The 10th Circuit panel reasoned that "it does not follow that everything that happens to the victim following the commission of the tort was intended by the tortfeasor" and found the district court's analysis of the malicious requirement incomplete stating: "The code must govern the outcome here." *In re Moore* at 1129. The Bankruptcy Court's error here is identical to that of the original *Moore* bankruptcy court.

Goldblatt comes to this Court for correction of a travesty resulting from cascading misinterpretations of fact and conflicting and unlawful legal conclusions that have caused a landslide of injustice. Manifest abuses of discretion and errors by the courts below have abridged Goldblatt's state and Federal constitutional rights of

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[15] *Petralia v. Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001).
[16] *Carrillo v. Su* (*In re Su*), 290 F.3d 1140 (9th Cir. 2002).
[17] *In re Moore v. Panalis*, 357 F.3d 1125 (10th Cir. 2004)

property and due process. Justice and equity require his writ of certiorari be granted to correct what amounts to an avalanche of errors.

STANDARD OF REVIEW

On appeal of a bankruptcy proceeding, a two-level standard of review is required:

1) Factual findings of bankruptcy court are reviewed under a "clearly erroneous" standard, and are overturned only when the reviewing court is left with firm and definite conviction that the bankruptcy court committed a mistake,

2) Legal conclusions of the bankruptcy court are reviewed under less deferential "*de novo* standard", and, if bankruptcy court premises findings of facts on an improper legal standard, such findings of facts lose the insulation of the protection of the clearly erroneous rule.

The decision of the Court of Appeals is reviewed for abuse of discretion. Discretion is abused if the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

SUMMARY OF ARGUMENT

The black letter law of the Bankruptcy Code requires an act "by the debtor" for exception to discharge. No court has found Goldblatt participated in any act that harmed, or was intended to harm, the A&W. A&W has judicially admitted in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits that it has never claimed that Goldblatt engaged in either negligent, unlawful or criminal behavior. [Appendix G, p. 116] This admission alone renders the subject debt dischargeable since the Code (and all relevant authorities) require an act "by the debtor."

The black letter law of the Bankruptcy Code also requires that the act by the debtor to be both "willful and malicious." No evidence exists on the record to show that

Goldblatt committed any act that was either "willful" or "malicious" as those terms are defined by bankruptcy authorities in- and outside the 5th Circuit – or any other circuit. Conversely, evidence exists that demonstrates conclusively that Goldblatt had a legal justification for the actions he personally took.

Trial court decisions in the Northern District of Texas require "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *In re Meece*, 261 B.R. 403, 406-407 (2001) This Court has held specifically that a debtor's action must be both willful and malicious and that the requirement of malicious action cannot be read out of the statute. The creditor must establish either an objective certainty of harm or a subjective motive to cause harm, performed "without just cause or excuse." Just cause or legal excuse overcomes objection to discharge.

Case law of every circuit shows that actions by others are never attributed to a debtor for the purposes of exception to discharge. It further shows that willful conduct is not sufficient by itself to sustain an objection to discharge and that malicious conduct is measured by "objective" or "subjective" legal tests. Case law rejects the kind of incomplete analysis the Bankruptcy Court made in this case.

ARGUMENT

Proper analysis of this case must begin with the language of §523(a)(6) which states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – .... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

Willful and Malicious Injury

Willful and malicious injury assumes an act by a debtor carrying either an objective certainty of harm or a subjective motive to cause harm. Implicit, however, in either of these tests is the requirement that the debtor actually perform the unlawful act. Courts at all levels where the issue has been adjudicated have held that "and malicious" cannot be read out of the statute and have held that "malicious" assumes an act "without just cause or legal excuse."

By the Debtor

The Creditor has judicially admitted[18] in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits in the Bankruptcy Court that it "has never claimed that the defendant [Goldblatt] engaged in either negligent, unlawful or criminal behavior." [Appendix G, p. 116]. If Goldblatt did not engage in unlawful behavior he could not have committed any tort – much less an intentional one – that would meet the requirements of §523(a)(6).

Justification and/or Legal Excuse

Goldblatt had more than one just cause for the actions taken:

In Texas, one is privileged to interfere with another's contractual relations (1) if it is done in a *bona fide* exercise of his own rights, or (2) if he has an equal or superior right in the subject matter. *Victoria Bank & Trust v. Brady*, 811 S.W.2d 931, 939-40 (Tex. 1991). Goldblatt had both.

1) Goldblatt validly foreclosed a note made prior to the existence of A&W. A&W was a stranger to that note,

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[18] Only deliberate, clear and unequivocal statements can constitute conclusive judicial admissions. *In re Corland Corp.* (CA5 Tex) 967 F2d 1069, 23 BCD 544, CCH Bankr L Rptr 74817.

and Goldblatt had no relationship with, nor duty to, A&W under the note or any other agreement. Goldblatt's foreclosure cut off A&W's rights and obligations to purchase the subject real estate as a matter of law. Therefore, Goldblatt's legal justification is clear and legally cognizable.

2) Goldblatt had a legal right to protect himself. A&W peremptorily sued Goldblatt on March 28, 1994, over two months prior to the foreclosure, and before any alleged conspiratorial act involving Goldblatt alleged by the Creditor. Goldblatt's actions were in defense of that suit.

3) The Agreement of May 30, 1994 between all of the parties to the 352nd court suit was to defend against A&W's claim and as a family settlement agreement – both legal under Texas law. It was not directed toward A&W. An agreement to resist a claim is not an actionable civil conspiracy without an unlawful, overt act in furtherance of the conspiracy. *Massey V. Armco Steel Company*, 652 S.W.2d 932, (Tex. 1983). The probate court found none. The Agreement of May 30, 1994 referenced professionals' breaches of fiduciary duty in the sale of company assets, not any action against A&W. [19]

The Injury Requirement

In Texas, a plaintiff must prove a "distinct," separate, tortious injury with actual damages arising from that injury to establish conspiracy. *City Products Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex.1980). The probate court found no such separate and distinct injury nor tort damages. [Appendix D, *passim*]

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[19] The subsequent payment by all involved professionals' insurance companies of the limits of their professional malpractice insurance policies establishes that the Executors' and Goldblatt's beliefs of malfeasance and suspicions of malpractice were based on reasonable grounds and equally establishes that they had probable cause and legal justification for their actions in participating in their May 30, 1994 Agreement.

A&W alleged three bases for its conspiracy claims:

1. Purported warranties of a 1991 Bill of Sale.
2. A false 1994 affidavit filed in the 48th court action.
3. The May 30, 1994 Agreements.

None of these can be applied to Goldblatt.

The Bill of Sale was executed in October 1991 by A&W's Secretary-Treasurer while she acted simultaneously as a vice president of the Estate-owned selling corporation – when A&W's principals knew of the 352nd court dispute, fully 28 months before Goldblatt became involved.

The state appeals court opinion shows that A&W could not have been damaged by the 48th court's judgment. [Appendix E, p. 95] The Opinion states:

> "A&W was not in privity with any of the parties to the 48th court lawsuit. A&W did not control the 48th court suit, its interests certainly were not represented by any party to the 48th court suit and it was not a successor in interest to any of the parties to the 48th court suit." [Appendix E, p. 94-95]

and

> "While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment." [Appendix E, p. 96 (fn. 18)]

Goldblatt was sued before he even contemplated the Agreements of May 30, 1994.

Therefore, the Bankruptcy Court simply and clearly erred in adopting the flawed and contradictory analysis of the Opinion that "Goldblatt 'wrongfully and intentionally conspired to inflict injury on A&W." [Appendix E, p. 128, (Memorandum Opinion, p. 9, quoting Judgment, p. 2)] It just as clearly erred when it concluded that "Goldblatt, at the very least, had full knowledge of all the details of the

conspiracy." [Appendix H, p. 129 (Memorandum Opinion, p. 10, quoting Opinion, p. 35)] Without paranormal psychic abilities, Goldblatt could not have known about activities taking place years and months before he became involved in the facts. At the date of the breach on which A&W's claims are based:

1) Goldblatt was unaware of the problems of the Estate, and had not purchased the note. [Appendix E, p. 37].

2) No claim regarding the breach of the 352nd court judgment had been (or ever was) asserted to affect A&W. [Appendix E, p. 37].

3) Goldblatt had not met any parties involved in the 352nd court suit except James Day or even knew of its existence.

4) Suit had not been filed in the 48th court and Goldblatt was never a party to the suit nor participated in the suit in any way. [Appendix E, p. 37].

5) The 48th court motion for summary judgment had not been filed. [Appendix E, p. 38].

6) There was no agreement among any of the parties of the 352nd court suit to do anything – their disagreements (and concomitant litigation) of the previous five years were ongoing. [Appendix E, p. 39].

7) And Goldblatt had not begun investigating the circumstances of the claims of the Estate, its corporation or A&W and did not do so until after A&W sued him.

The gist of civil conspiracy is the injury intended. One can not agree either expressly or tacitly to the commission of a wrong of which he does not know. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex.,1995) The record clearly shows that there could have been no meeting of the minds of the alleged conspirators on or before November 27, 1993. While it is true that Goldblatt brought the warring Estate parties together through the Agreements of May 30, 1994, he did so after (and because) A&W had filed suit alleging "conspiracy" and at a time when such action was protected as an

agreement to defend a claim and a legal family settlement agreement.

A&W's theory that the object of the conspiracy was to breach the Obligation to Purchase Agreement contained in Section 28 was an attempt to twist the facts to fit its original, faulty allegations. Goldblatt was never a party to the Agreement for Acquisition of Assets or the Lease. More important, however, is the fact that the contingencies of Section 28 never triggered formation of a sale contract because the property title was never clear – as the appeals court Opinion shows. [Appendix E, p. 34, (fn. 4)]. As holder of the 1985 mortgage, Goldblatt had legal rights superior to A&W's as a matter of law.

Thus, the Bankruptcy Court clearly erred in finding that Goldblatt could have conspired to breach any agreement with A&W or to participate otherwise in the alleged conspiracy – just as A&W has judicially admitted. "Wrongfully and intentionally" simply does not meet the legal standard required by §523(a)(6) of "willful and malicious" required by this Court. The Bankruptcy Court's reliance on such contorted and conflicting facts is clear error as is its misinterpretation of the controlling law. It is clear that Goldblatt is entitled to discharge under §523(a)(6).

Supreme Court Authority

All circuits recognize that dischargeability under §523(a)(6) is controlled by *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998) where this Court found that:

> . . . nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit

> observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences of an act," not simply "the act itself." *Id.* at 978.

The *Kawaauhau* court declared that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6)" (*Id.* at 979) and affirmed the interpretation of the 8th Circuit over previous rulings of the 6th and 10th Circuits.

The Court further instructed that "when both a specific and a general provision govern a situation, the specific one controls." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). There is no question that §523 (a)(6) is a specific provision that must be narrowly construed.

Texas Law and the Bankruptcy Court Judgment

The Bankruptcy Court excepted Goldblatt's judgment debt under §523 (a)(6) because it found conspiracy to be a willful tort. Its finding is clearly erroneous under Texas law and conflicts with previous decisions in the same court. It is further erroneous because it relies for its conclusion on state law rather than the Bankruptcy Code language and Federal authority.

Relying on *Ward v. Sinclair*, 804 S.W.2d 929, 931 (Tex. App. – Dallas 1990), writ denied), the Bankruptcy Court pointed out that:

> for a defendant to be liable for civil conspiracy to defraud, it must be shown not only that there was such a conspiracy but that the particular defendant charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy and intended to have it brought about. [Appendix H, p. 136].

The record is clear; no such evidence exists. The Bankruptcy Court's posture effectively and impermissibly

shifts the burden of proof and alters "the balance of bankruptcy policy struck by section 523." *Chevy Chase Bank, FSB v. Briese* (*In re Briese*), 196 B.R. 440, 448 (Bankr. W.D. Wis. 1996) (quoting *Chase Manhattan Bank, N.A. v. Ford* (*In re Ford*), 186 B.R. 312, 317 (Bankr. N.D. Ga. 1995).

The Bankruptcy Court correctly concluded that civil conspiracy is an "intentional tort" but failed to analyze its essential nature as a "derivative tort." Civil conspiracy, the Bankruptcy Court recognized, can only be found in conjunction with "one or more overt unlawful acts." [Appendix H, p. 134] See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App.Dallas, 2002). "Willful injury" comes from the underlying tort, not from the conspiracy itself.

The Bankruptcy Court should have realized that merely proving joint intent to engage in conduct that resulted in injury is not sufficient to establish cause of action for civil conspiracy or exception under §523. Civil conspiracy requires specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996). No such finding of specific intent, unlawful purpose or Goldblatt's subjective state of mind was made by the probate court. [Appendix D, *passim*]. "The gist of a civil conspiracy is the damage resulting from commission of a wrong, which injures another, and not the conspiracy itself." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856-858 (Tex. 1968). Breach of contract is not a tort; legally, then, conspiracy to breach a contract is not conspiracy to commit a tort.

For civil conspiracy to arise, parties must be aware of wrongful conduct or harm at the beginning of the agreement. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (Tex.,1996). No such finding was made by the probate court. Appendix D, *passim*]. It could not have been, because the November 1993 breach of contract

happened months before the accused conspirators could have agreed on anything.

The Bankruptcy Court compounded the error of the appeals court Opinion that admitted that the trial court made no express finding of an unlawful act or resulting damages but in clear error "implied" both the act and resulting damages. [Appendix E, p. 62]. "Courts of Appeals can only 'unfind' facts, not make original findings of fact, and exceeds its authority when it implies a finding of actual damages in tort." *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986).

Northern District Bankruptcy Law

In *In re Grisham* (*Mabank Bank v. Grisham*), (N.D.Tex. 2000), 245 B.R. 65, 43 Collier Bankr.Cas.2d 1352, the court found that for purposes of the discharge exception, "willful" injury requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury, declaring that a "creditor seeking to prove 'willful' conduct within the discharge exception to willful and malicious injury must establish either an objective certainty of harm or a subjective motive to cause harm." *Id.* at 70 It reasoned that the "debtor may act deliberately or intentionally to injure a person but have just cause or excuse to do so, and in that case, debt arising from debtor's conduct would not be 'malicious' within the meaning of §523 (a)(6). *Id.* at 70.

Grisham reaffirmed that the words "and malicious" cannot be read out of the statute. *Id.* at 70. A&W's judicial admission regarding Goldblatt precludes a finding of malice either from the record of the probate court which controls and which found none or either the objective or the subjective test.

Grisham also reaffirmed the just cause exception:

> For example, a driver of an automobile deliberately swerves into a car in an adjoining lane to avoid running over a child standing in his lane. The driver

> intends to cause injury in the adjoining car to save the life of the child. The words "and malicious" cannot be read out of the statute.[20]

The *Grisham* court found that the debtor-wives did not intentionally injure the creditor and allowed their discharge. *Grisham* reasoning should apply in this case because Goldblatt could not have personally injured A&W.

Later the same year, the Bankruptcy Court for the Northern District of Texas specifically followed *Grisham* (and 5th Circuit holdings in *In re Meece*, 261 B.R. 403, (2001). The *Meece* court laid out the requirements, weaving together pre- and post-*Kawaauhau* dicta:

> A "willful" injury requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). To establish an intentional injury, the creditor must establish "either an objective substantial certainty of harm or a subjective motive to cause harm." *In re Miller*, 156 F.3d 598, 606 (5th Cir.1998), cert. denied, 526 U.S. 1016, 119 S.Ct. 1249, 1250, 143 L.Ed.2d 347 (1999). In addition to being willful, the injury must be "malicious." 11 U.S.C. § 523(a)(6). Malicious means "without just cause or excuse." *In re Garner*, 56 F.3d 677, 681 (5th Cir.1995). The Supreme Court in *Kawaauhau* did not collapse the malicious definition into the willful injury definition nor otherwise read the words "and malicious" out of the statute. *In re Grisham*, 245 B.R. 65, 71 (Bankr.N.D.Tex.2000). See *Meece* at 406-407.

The *Meece* Court found that while Meece intentionally infringed on Rolex trademarks, the trial court made no finding of Meece's subjective state of mind to

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[20] See *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

determine his intent, and that certain findings of the trial court precluded a finding that Meece intended to injure Rolex. It concluded that the court may not read the intent to injure requirement into the statute – precisely as the Bankruptcy Court has done in this case. *In re Meece* at 409-410.

5th Circuit Case Law

5th Circuit cases following *Kawaauhau* have not consistently followed its guidelines.

In *Texas v. Walker*, 142 F.3d 813, 126 Ed. Law Rep. 92 (5th Cir. 1998), a panel considered the intentional action of a college professor who failed to report consulting income, violating University policies, and found it to be dischargeable.

In *In re Debtor* (*Miller*), 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998), the panel considered a voluntary Chapter 7 bankruptcy seeking protection from a state court judgment. The bankruptcy court declined to rest its summary judgment on §523(a)(6) because the state court jury had not decided whether Miller had inflicted a "willful and malicious injury." Miller and the creditor both appealed. The panel decided that the scope of the collateral estoppel doctrine is circumscribed by the particularized findings of the jury [or in this case, the Findings of Fact and Conclusions of Law of the probate court. See Appendix D.] See *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1379 (5th Cir. 1996). As in *Miller*, the probate court made no finding of any unlawful act by any Estate-aligned party, and made no finding as to Goldblatt's state of mind.

Following *Corley v. Delaney* (*In re Delaney*), 97 F.3d 800 (5th Cir. 1996), the *Miller* panel held that "for willfulness and malice to prevent discharge under §523(a)(6), the debtor must have intended the actual injury that resulted" and not just perform an intentional act that resulted in injury. *Id.* at 802.

The *Miller* panel reasoned that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. It noted that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts." *Kawaauhau*, 118 S. Ct. at 977. The panel avoided equating §523(a)(6) torts and intentional torts, saying ". . . . Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful." In this case, the Bankruptcy Court clearly erred by being in conflict with the *Miller* holding.

Because Miller's state court jury determined only that Miller "proximately caused" the injury, a less demanding standard than the 5th Circuit's "substantial certainty," his acts were held "not malicious" under §523(a)(6).[21]

The *Miller* panel adopted the alternative definition of "implied malice" (following *Kawaauhau* at 975) as "acts done with the actual intent to cause injury," saying, "we hold that this is the test for 'willful and malicious injury' under §523(a)(6). Thus, we hold that an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *Miller* at 606.

Because the state court findings did not speak to Miller's fraudulent intent or the objective probability of injury from tortious acts, the panel found the parties were free to try the issue for the first time and reversed and remanded. Identically, the state court findings do not speak

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[21] The *Miller* panel followed *Vickers* in defining "malicious" as "without just cause or excuse." *Vickers v. Home Indem. Co.*, 546 F.2d 1149. 1150 (5th Cir. 1977), (quoting 1A Collier, Bankruptcy 17.17, at 1650.4 to 1650.6 (1976)) See also *Corley v. Delaney* (*In re Delaney*), 97 F.3d 800, 802 n.6 (5th Cir. 1996); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983); *Petty v. Dardar* (*In re Dardar*), 620 F.2d 39, 40 (5th Cir. 1980).

to Goldblatt's state of mind and A&W's judicial admission confirms that Goldblatt made no action at all that would sustain objection to discharge.[22]

The following year, the 5th Circuit decided in *In re Cook*, 169 F.3d 271 (5th Cir. 1999) where the bankruptcy court held that there was no evidence that Mrs. Cook participated in the activities about which the creditor complained and the creditor had abandoned its objections to Mrs. Cook's discharge. e.g., Fed. R. App. P. 28(a)(9); *Huckabay v. Moore*, 142 F.3d 233, 238 n.2 (5th Cir. 1998). The panel reversed and remanded for further proceedings consistent with the opinion regarding Mr. Cook because the bankruptcy court's findings were based on erroneous conclusions. The analogy to Goldblatt's case is obvious: There is no evidence that Goldblatt participated in the activities about which A&W complained, and A&W has admitted that Goldblatt never committed any act that could have damaged A&W.

In *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001), a panel acknowledged its duty to construe exceptions narrowly in favor of the debtor while reaffirming "§523(a)(6) requires a deliberate or intentional injury." *Id.* at 405.[23] The *Hickman* court acknowledged the limited the scope of the term "willful and malicious injury" under §523(a)(6) to "conduct designed to cause deliberate or intentional injury" and not merely intentional conduct that resulted in injury. *In re Quezada*, 718 F.2d 121, 123 (5th Cir. 1983).

In re Williams, 337 F.3d 504 (5th Cir. 2003), also supports Goldblatt's position. In it, the panel determined

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[22] *In re Caton*, 157 F.3d 1026 (5th Cir. 1998), decided after *Miller*, followed *Garner*. *In re Garner*, 56 F.3d 677 (5th Cir. 1995). The *Caton* panel found that an Illinois libel judgment against Caton was for a tort that was both intentional and without just cause or excuse and therefore non-dischargeable. *Caton's* facts are clearly inapposite to Goldblatt's case but help bring the issue into sharp focus by contrast.

[23] See also *In re Greenway*, 71 F.3d at 1180 n.8.

that §523(a)(6) did not except debts arising out of a knowing breach of contract of a collective bargaining agreement. The *Williams* panel reviewed the interpretation of §523(a)(6) *de novo* as a question of law, and cited the *Kawaauhau* court's conclusion that the provision applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury. *Id.* at 508. Further, the *Williams* panel cited *Miller* saying:

> a debtor must have acted with "objective substantial certainty or subjective motive" to inflict injury. *Miller v. J. D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598, 603 (5th Cir. 1998). Despite similarities in the language used to describe an injury under Section 523(a)(6) and intentional torts, Section 523(a)(6) creates a narrower category of tortious conduct. *Id.* at 604 (noting, "Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful.") *Id.* at 604.

The *Williams* panel further acknowledged that the *Kawaauhau* Court rejected a broader construction of §523(a)(6) that would make debts from intentional acts that cause unintended or unanticipated injuries non-dischargeable in bankruptcy because such an interpretation would be contrary to the notion that exceptions to discharge should be confined to those plainly expressed. *Williams* at 509 (citing *Gleason v. Thaw*, 236 U.S. 558, 562, 35 S.Ct. 287, 289, 59 L.Ed. 717 (1915)). The *Williams* panel found that the *Kawaauhau* opinion seems to reject the proposition that a debt arising from a knowing breach of contract is a willful and malicious injury excepted from discharge. *Id.* at 509. The 5th Circuit position that a breach of contract may involve an intentional or substantially certain injury is apparently in conflict with the holding of this Court and is inapposite to the facts of this case because Goldblatt was never a party to any contract with A&W, and A&W has judicially admitted that Goldblatt never performed an act that could

have harmed A&W. (See *Walker*, 142 F.3d at 823; and *Miller*, 156 F.3d at 606).

The *Williams* panel held that, after *Kawaauhau*, an intentional breach of contract accompanied by tortious conduct that results in willful and malicious injury, excepts the resulting debt from discharge under §523(a)(6).[24]

In the most recent 5th Circuit case, the same panel that decided Goldblatt's case excepted discharge to lawyers who were found to have frivolously instituted proceedings for the purposes of harassment and delay. Their case is distinguishable from the facts of this case because it includes acts by the debtors intending certain harm the opposing party. See *In re Keaty*, 2005 WL 57312 (5th Cir. 2005). The *Keaty* panel, appears to place *Miller* in conflict with *Kawaauhau* by opining that "'malicious' as an act done with the actual intent to cause injury . . . . is synonymous with the definition of 'willful' and thus aggregated 'willful and malicious' into a unitary concept." *Id.* at page 5. The *Keaty* panel recognized that collateral estoppel is circumscribed by the particularized findings of the state court. While the *Keaty* findings may support exception, the findings in this case do not.

Walker, *Miller* and *Williams* (and the cases they cite) all involve fact situations in which each judgment debtor was personally involved in a direct contractual relationship with the judgment creditor but were discharged. That is not the situation here, where no such relationship ever existed between Goldblatt and the judgment Creditor, A&W. In *Keaty*, no contractual

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[24] The case footnotes indicate that the Ninth Circuit held that "a simple breach of contract is excepted from discharge under §523(a)(6) only when it is accompanied by malicious and willful tortious conduct." See *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (pre-*Kawaauhau*). See also *In re Jerich*, 238 F.3d 1202, 1205 (9th Cir. 2001). In *In re Colcazier*, 134 B.R. 29, 33 (Bankr. W.D. Okl. 1991), where the Bankruptcy Court held that §523(a)(6) exempts only damages from tortious breaches of contract from discharge.

relationship existed, but the courts found a knowing act by the Keatys that was without foundation or justification.

Other Circuits' Authority

The *Miller* panel recognized that the law outside the 5th Circuit concerning the meaning of "malicious" in §523(a)(6) has long been confused.[25] It remains so with this case.

1st Circuit

In *Jones v. Svreck* (*In re Jones*), 300 B.R. 133 (1st Cir. 2003), the BAP held that Jones' sexual harassment of Svreck was non-dischargeable because of evidence that Jones actions were intentional and that he intended to harm Svreck. However, the panel distinguished the *Jones* facts from *Nolan* in which the debtor was discharged because Nolan was not the individual who engaged in the discriminatory treatment. See *Hamilton v. Nolan* (*In re Nolan*) 220 B.R. 727, 730 (Bankr. D.C. 1998). The parallel to Goldblatt's facts is unmistakable. The *Nolan* court stated that "even if Butler's behavior were found to be willful and malicious, this could not be imputed to [Nolan]. *Id.* at 731.[26] Clearly, Goldblatt's case brings the 5th Circuit squarely into conflict with the 1st Circuit.

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[25] Citing generally *Firstmark Fin. Corp. v. Aldrich* (*In re Aldrich*), 37 B.R. 860, 862-64 (Bankr. N.D. Ohio); Charles Jordan Tabb, The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate, 59 Geo. Wash. L. Rev. 56, 61-89 (1990); Karen N. Fischer, Comment, The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice, 7 Bankr. Dev. J. 245, 248-59 (1990).

[26] The panel further distinguished *Jones* from *Voss v. Tompkins* (*In re Tompkins*) 290 B.R. 194, 199 (Bankr. W.D.N.Y. 2003) in which the judgment entered did not indicate that the underlying causes of action in the complaint were valid or had been admitted by the debtor, thus precluding application of collateral estoppel.

6th Circuit

In *In re Trantham,* 304 B.R. 298, 51 Collier Bankr.Cas.2d 961, Bankr. L. Rep. P 80,045, 2004 Fed.App. 0001P, (6th Cir. BAP 2004), a panel found that a patent infringement action created a non-dischargeable debt from malicious injury because Trantham's stated purpose in infringing the creditor's patents was to avoid paying for its technology. The panel found patent infringement, to be the "invasion of a protected interest" so that Trantham's act was willful and malicious.[27] *Id.* at 309

9th Circuit

In *Petralia v. Jercich.* 238 F.3d 1202, 1205 (9th Cir. 2001) a panel, following the 5th and 6th circuits, reasoned that Jercich had the clear ability to pay Petralia his wages, yet chose instead to use the money for his personal benefit thereby inflicting willful and malicious injury that excepted the debt.

The *Carrillo v. Su* (*In re Su*), 290 F.3d 1140 (9th Cir. 2002), panel reaffirmed *Jercich. Id.* at 1142 stating, "The subjective standard correctly focuses on the debtor's state of mind and precludes application of §523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain." *Id.* at 1146. But the panel opined that the malicious prong was separate and distinct from the willful prong of §523(a)(6). "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Jercich*, 238 F.3d at 1209. Although the *Su* court held Su's debt to Carrillo non-dischargeable, the BAP reversed, holding that the bankruptcy court made no findings regarding malice, thereby erroneously "conflating" the "willful" and "malicious" prongs in its

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[27] See *In re Meece*, 261 B.R. 403, 406-407 (N.D.Tex. 2001). Meece's debt was found to be dischargeable in a trademark infringement action.

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§523(a)(6) analysis – just as was done in this case. Such holding appears to conflict with 5th Circuit law. The *Su* panel affirmed the BAP finding that "the Bankruptcy Code's legislative history makes it clear that Congress did not intend §523(a)(6)'s willful injury requirement to be applied so as to render non-dischargeable any debt incurred by reckless behavior. . . ." finding that the subjective standard correctly focuses on the debtor's state of mind and precludes application of §523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain. *In re Su* at 1144.

10th Circuit

In *In re Moore v. Panalis*, 357 F.3d 1125 (10th Cir. 2004), the bankruptcy court ruled in favor of Moore, holding that a fraud verdict did not represent a debt for a "willful" injury under §523(a)(6). On appeal, the district court disagreed, but the 10th Circuit panel reasoned that "it does not follow that everything that happens to the victim following the commission of the tort was intended by the tortfeasor," (*Id.* at 1128) noting that "if a tortfeasor was liable for unintended injuries, [e]very traffic accident stemming from an initial intentional act – could fit the description. A 'knowing breach of contract' could also qualify. A construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Id.* at 1128. The *Moore* panel found that the verdict established only that Mr. Moore intended to deceive Mr. Panalis, and that the district court's analysis of the willful and malicious requirement was incomplete without correctly applying the Bankruptcy Code, stating: "The code must govern the outcome here." *Id.* at 1128. The *Moore* decision places the 10th Circuit in direct conflict with 5th Circuit.

Because the judgment debt against Goldblatt arose from the breach of contract by and between third parties – before Goldblatt ever became involved in the facts of the

case – it is unreasonable and wholly beyond the intention of the statute and the context of §523(a)(6) authorities to hold Goldblatt's debt to be non-dischargeable. In it, a substantial injustice that has been left to this Court to correct.

CONCLUSION

Every single applicable case in- and outside the 5th Circuit relating to §523(a)(6) supports Goldblatt's position that his debt is dischargeable. Not a single case holds a debt excepted from discharge by a judgment debtor who did not act directly to injure the creditor both willfully and maliciously. Because Goldblatt did not participate in any way in the original asset sale in 1991, was not involved in any way in the 1993 breach of contract, did not participate in any way in the litigation in the 352nd and 48th courts, and because the Creditor has judicially admitted that Goldblatt has never engaged in negligent, unlawful or criminal behavior toward it, this Court should reverse.

Similarly, the Bankruptcy Court's reasoning that conspiracy as an intentional tort meets the requirements of the "willful" prong of the "willful and malicious" requirements of §523(a)(6), shows clearly that the Bankruptcy Court neither fully considered nor directly addressed the section's "malicious" prong, resulting in clear and reversible error that must be corrected by this Court.

The authorities at every level and in every circuit support Goldblatt's discharge.

1) The Creditor, A&W, has judicially admitted in the bankruptcy court that Goldblatt never made any act that could have damaged it.

2) No court has ever found that Goldblatt committed any unlawful act that could have damaged the Creditor.

3) No court has ever made a finding regarding either Goldblatt's objective intention to harm the

Creditor or his subjective intent to perform any act that was substantially certain to injure the Creditor.
4) No court has ever made any finding regarding Goldblatt's subjective state of mind regarding any intent to damage the Creditor.

Instead, the record is clear that Goldblatt had a right – and therefore a legal justification – to protect himself and his investment from litigation brought by A&W as a third party with which he had no business relationship and to which he owed no duty. For these reasons, Goldblatt requests that this Court declare that the judgment debt as it pertains to Goldblatt to be wholly dischargeable under §523(a)(6) as a matter of law and to reverse and render the judgment in his favor.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari with separate Appendix has been served on A&W Industries, Inc.'s Attorney of Record, Mr. Frank R. Jelinek, Esq. at 801 East Abram, Suite 102, Arlington, Texas 76010, on January 28, 2005, via first class mail.

Frank P. Hernandez

(2)

Supreme Court U.S.
FILED

041053 JAN 28 2005

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT

Petitioner,

v.

A&W INDUSTRIES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDICES
(Volume II)

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APPENDIX A

CAUSE NO. 90 - 1522 - C - 2

A&W INDUSTRIES, INC. Plaintiff	IN
VS.	PROBATE COURT NO. 2
INDIAN VILLAGES, INC. SHIRLEY LONG, SHIRLEY LONG as Trustee for the Klutz Trust, KENN GOLDBLATT, WILBERT OF NORTH TEXAS, INC., JAMES M. DAY and RAMONA DAY as Independent Executors of the Estate of Tommy Joe Day, KEITH WOODLEY, and JOHN COLLINS, Defendants,	OF TARRANT COUNTY, TEXAS

JUDGMENT

Came on to be considered, DEFENDANT KENN GOLDBLATT'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW filed January 15, 1997 and heard February 26, 1997. After hearing arguments the Court finds that the Motion is good.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foreclosure of the Landmark Life Insurance Company mortgage by Kenn Goldblatt on June 7, 1994, cut off, all claims of A&W Industries, Inc. to any right or obligation to purchase the subject real property, as a matter of law.

The motion is therefore GRANTED.

SIGNED this 27th day of May 1997.

PAT FERCHILL JUDGE

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APPENDIX B
REPORTER'S RECORD [EXCERPT]

VOLUME 29 OF 29
Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED,	§	IN THE PROBATE COURT
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
vs.	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	NO. TWO
vs.	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	TARRANT COUNTY, TEXAS

On the 28th day of July, 1999, the following trial came on to be heard in the above-entitled and numbered cause before the Honorable Pat Ferchill, Judge presiding, held in Fort Worth, Tarrant County, Texas. Proceedings reported by machine shorthand.

KAY MILLER, CSR
Deputy Official Court Reporter
Probate Court No. 2
Tarrant County, Texas

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THE COURT: I'm going to make a few preliminary remarks, and I'm not entirely sure I'm going to render my decision or all of my decision at this time, and the things that I mention, I want for the record-- I'm going to have disclaimered to state that these are not my formal findings of fact and conclusions of law. They will be observations, and they will include but not be limited to some of the

things the Court has found during this trial.

I just still am just appalled at the behavior of the independent executors. I personally have never seen anything like it. For James Day, he was a poor historian. He admitted that he had memory problems, and from hearing his testimony, one could have easily thought that Mr. McCown was supposed to be the executor and not Mr. Day.

So to that extent I may agree with you, Mr. Woodley and Mr. Hernandez. The Court can't find whether or not he was informed by his attorney about his executive duties or not, because I don't believe that's stated in the record.

The tone, the flavor of his testimony was consistently in the nature of Mr. McCown being the executor and not Mr. Day, and we know that's not the case. Ramona Day, I'm not quite sure what she did for the estate. Her testimony before this Court was that she signed a document that she claims was incomplete.

The document alludes to a lease attachment that's incorporated therein. This is a woman who is an adult who has capacity who has worked in a legal office as a legal secretary, and she expects this Court to set aside her signature on a

contract because she didn't have enough time to read it or it wasn't complete. I find that testimony not credible.

And Mr. Day, his testimony, if I remember it correctly, was that the agreement was mailed to him and he signed it and he mailed it back, and apparently neither one of them understood the ramifications of Section 28 until months after they had signed this agreement.

Now, let's just assume for a minute that these executors discovered in the fall of 1993 that they may have made a mistake. What would they do? Well, first of all, they'd sit down with their own attorneys and discuss-- Before they expose the estate to liability, they would sit down with their attorneys and discuss these misgivings or these claims.

If they felt like that the attorneys were part of it, they could have gone to another attorney and said, "I believe that somebody may have misrepresented facts to me. What are my options." I mean, executors just can't on their own fire attorneys and just stop the process.

And I think the best testimony is clear that the legal process was ongoing, and if James and

Ramona Day didn't know about it, that's their fault. They were the executors. It was a clear breach of contract.

And Mr. Day, instead of being personally insulted by the $95,000 offer should have gotten out the contract or got a copy of the contract and read. Now, I'm not going to go into whether or not the $95,000 was an example of horse trading on the part of A & W Industries or their firm belief that that was the value of the real estate.

But clearly the contract James and Ramona Day signed allowed them, gave them the opportunity to make a bid or offer a price less than the stated value of $327,000. And if you think for a minute, this changed from an option to an obligation.

And I think it's only reasonable that if you're obligating yourself to buy something in the future that there might be this so-called escape hatch. I think Mr. Andrews in his testimony spoke about that. He put that in for protection of his clients.

Be that as it may, that's really not the issue here. Instead of James Day being personally insulted and getting his nose out of joint, he should

have got out the contract and read it, and when he read that A & W Industries had the right to make a first offer, then he should have sat down with his then attorneys, his new attorneys, some attorneys, and discussed what is going to happen if we stop this process right now.

What if we walk away from this contract? What are the ramifications to this estate? And before he did that, he should have had advice from his attorneys, and he did not, and Ms. Day did not. And instead I'm not exactly sure when the estate regained counsel, and I'm not sure that that's important.

But I'm focusing on the action of James Day and I find that he, with Ms. Day going along with it, stopped the process. So I find there was a breach of a contract. It's just to me simple contract situation breached. Now there's been a heck of a lot of other water has gone under the bridge.

I want to make something clear about another thing about Mr. Day. I don't consider Mr. Day writing an inquiry, "Put this one in the hopper" to be instructions to Frank McCown to negotiate a deal. I think the only testimony we have in the record that anyone ever authorized Mr. McCown to negotiate a deal

was his own testimony, and the Court's chosen to believe it, that the only time that he was authorized to go out and negotiate a contract was with A & W Industries.

And you know the executors were the ones that should have said we want-- They're the ones that give the instructions, and I see nothing in the record to show that he was ever authorized to negotiate with anyone else.

Now, as far as the conspiracy goes, gentlemen, I think you may have made some dots, but just to be really simplistic, the dots don't connect. I just don't see a conspiracy here. And I don't see a reason for Mr. McCown to be involved in the conspiracy.

He has paid for-- His malpractice carrier has paid for the alleged malpractice problems in this matter, and I just don't see anything that he has done that rises above the level of errors and omissions as a professional, and the Court just fails to find that there was a conspiracy.

Now, based upon that, the Court is going to award A & W Industries their requested damages in the amount of rent which they've testified here was $274,000, plus the Court will award the rent,

I guess, on a prorata basis to the date of judgment. Court will find that the $2,500 is a reasonable monthly rent for market value rent. The Court will award them their attorney's fees as requested.

Now, as to the matter of the constructive trust, the Court has wrestled with this issue throughout the trial, and I'm of the belief that in order for the Court to invoke that remedy, there must be clean hands on the part of the party requesting it.

And I just find that Ms. Rountree's testimony was so lacking, and so lacking in credibility, and that the lease was obviously violated. I think that if they had a lease, they should have been careful to pay the taxes. They should have observed the letter of the lease given the circumstances they were in, and I'm going to deny the constructive trust.

That leaves-- The Court having previously found that Mr. Goldblatt's foreclosure was valid, the Court will not affect that. The Court will find that A & W should be awarded the amount of $150,000, which the Court finds to be a reasonable market value of that property at that time.

The Court's going to find that

notwithstanding Mr. Goldblatt's owning the property at 827 Dawn Lane, the Court's going to find that all of the allegations of the intervenors, the executors, the Wilbert, the Court is going to enter a take-nothing judgment on all of those.

Now, the only thing the Court is going to take under advisement and study and think about is whether or not the Court is going to find that there was a conspiracy as alleged by A & W Industries, and if so, what damages the Court will award. The Court will find that the Plaintiffs, intervenors and executors and et cetera, that they had reasonable attorney's fees, but the Court does not award same.

This is one of the most incredible cases the Court has ever heard, and I just can't go back enough to the point about the executors' actions in this and what they have done to the estate. That's all the rendition I care to give today.

I know y'all are going to have some questions, and I think you all should write them down and we'll meet, and if there's specific matters the Court hasn't ruled on, we'll get together. I'll notify you when I've made a decision about the conspiracy allegations against the executors, et cetera. Court is in recess.

APPENDIX C

Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED,	§	IN THE PROBATE COURT
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
vs.	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	NO. TWO
vs.	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	TARRANT COUNTY, TEXAS

JUDGMENT

On May 26, 1999, this cause came on to be heard. James M. Day and Ramona Day, the Independent Co-Executors of the Estate of Tommy Joe Day, appeared in person and through their attorney of record, Keith Woodley. Kenn Goldblatt appeared in person and through his attorney of record, Frank P. Hernandez. Wilbert of North Texas, and Indian Villages, Inc. appeared through their President, Kenn Goldblatt and through their attorney of record Frank P. Hernandez. Shirley Long and Shirley Long as Trustee for the Klutz Trust appeared through her attorney of record, Charles E. McDonald. George Day appeared in person and represented himself pro-se Frank D. McCown appeared in person and through his attorneys of record William D. Cobb, Jr. and Shari Keeley. Bert George, Sherry Rountree, and John C. Applewhite appeared in person and through

their attorneys of record Orsen E. Paxton, III, Jeff S. Knotts, and Daniel J. Parish. A&W Industries, Inc. appeared through its President, John C. Applewhite and its attorneys of record Orsen E. Paxton, III, Jeff S. Knotts, and Daniel J. Parish. All parties announced ready for trial. The jury having been waived by agreement of the parties, all questions of fact were submitted to the Court. All issues relating to the claims against Frank D. McCown as well as Lynn Ross, John Saltarelli and Stanley McSwane, were fully and completely settled. The Court, after examining the evidence and hearing the testimony presented and the arguments of counsel, finds as follows:

1. James M. Day and Ramona Day, as Independent Co-Executors of the Estate of Tommy Joe Day, entered into a contract with A&W Industries, Inc. for the sale of Estate assets and the lease and eventual sale of Estate real property.

2. The lease agreement incorporated into the contract James and Ramona Day entered into gave A&W Industries, Inc. the opportunity to submit an offer to purchase the leased property for less than $327,000.

3. The lease agreement obligated the independent co-executors, as controlling shareholders of Wilbert of North Texas, Inc., to sell, and A&W Industries, Inc., to purchase the leased property.

4. James M. Day and Ramona Day, acting as Independent Co-Executors of the Estate of Tommy Joe Day, breached the contract entered into with A&W Industries, Inc.

5. The following parties wrongfully and intentionally conspired to inflict injury on A&W Industries, Inc.: James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Individually, and as Trustee of the Klutz Trust, Wilbert of North Texas, Inc., and Indian Villages, Inc.

6. No one party was more than 50% responsible for the damage caused to A&W Industries, Inc.

7. A&W Industries, Inc. is entitled to recover from James M. Day and Ramona Day, as Independent Co-Executors of the Estate of Tommy Joe Day, and Kenn Goldblatt, jointly and severally, the sum of $274,000.00, as damages for rent paid by A&W Industries, Inc. through July, 1999, and further is entitled to recover from Kenn Goldblatt, individually, rent paid in the amount of $3,000.00 per month, from and including August, 1999, through the date of this Judgment.

8. A&W Industries, Inc. is entitled to recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, its attorneys' fees and expenses in the amount of $550,212.18. A&W Industries, Inc. is further entitled to recover attorneys' fees and expenses, jointly and severally, in the amount of $30,000.00, if this judgment is appealed; $10,000.00, if petition for review is submitted to the Texas Supreme Court; $20,000.00 if briefs are submitted to the Texas Supreme Court; $10,000.00 if argument is made before the

Texas Supreme Court; and $20,000.00, if this judgment is appealed to Federal Court.

9. A&W Industries, Inc. is entitled to recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, the sum of $150,000, as the reasonable market value of the leased premises at the time of the breach of the lease agreement provision requiring the sale of the leased property.

Based on the findings of the Court, it is therefore, ORDERED ADJUDGED AND DECREED that A&W Industries, Inc. have and recover actual damages from James M. Day, Ramona Day, and Kenn Goldblatt, jointly and severally, in the sum of $274,000.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover actual damages from Kenn Goldblatt, individually, in the sum of $30,000.00 representing rent paid by A&W Industries, Inc. from August, 1999 through May 31, 2000.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover actual damages from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, in the sum of $ 150,000.00, as damages for the breach of the lease agreement provision requiring the sale of the leased property.

IT IS FURTHER ORDERED that A&W Industries, Inc. have and recover from James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert

of North Texas, Inc., and Indian Villages, Inc., jointly and severally, necessary and reasonable attorneys' fees and expenses in the following amounts:

a. $550,212.18 for the trial of this case;

b. an additional $30,000.00, if this Judgment is appealed to the Court of Appeals;

c. an additional $10,000.00, if a petition for review, or a response thereto, is to be filed with the Supreme Court of Texas;

d. an additional $20,000.00 if the Supreme Court of Texas requests that the parties file briefs on the merits;

e. an additional $10,000.00 if the Supreme Court of Texas sets the case for argument;

f. an additional $20,000.00 if this Judgment is appealed to Federal Court

All appellate attorneys fees are conditioned upon A&W Industries, Inc. being the successful party during appeal.

IT IS FURTHER ORDERED that the award of attorneys' fees is taxed as part of the costs of court.

IT IS FURTHER ORDERED that the following parties pay the following sums as punitive or exemplary damages resulting from their conduct:

$75,000.00 James M. Day, individually, and as Independent Co-Executor of the Estate of Tommy Joe Day;

$75,000.00 Ramona Day, individually, and as Independent Co-Executor of the Estate of Tommy Joe Day;

$50,000.00	Kenn Goldblatt
$25,000.00	George Day
$25,000.00	Shirley Long Day
$10,000.00	Wilbert of North Texas, Inc.
$5,000.00	Indian Villages, Inc.

IT IS FURTHER ORDERED that James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., their agents, servants, employees, or any person acting in concert with them are permanently enjoined from directly or indirectly interfering in any way with the business and operation of A&W Industries, Inc., or the real or personal property of A&W Industries, Inc., including the leased property located at 827 Dawn Lane, Grapevine, Texas, and from pursuing further claims against A&W Industries, Inc., Bert George, Sherry Rountree, John C. Applewhite, or their attorneys, that are in any way related to the. ownership or operation of A&W Industries, Inc. d/b/a Wilbert of North Texas.

IT IS FURTHER ORDERED that this Judgment shall bear interest at the rate of 10% per annum from the date of this Judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims asserted or which could have been asserted in this cause by James M. Day and Ramona Day, Independent Co-Executors of the Estate of Tommy Joe Day and/or by Wilbert of North Texas, Inc. against Defendant Frank D. McCown are hereby dismissed with Prejudice to the refiling of same.

IT IS FURTHER ORDERED that all costs of court expended or incurred in this cause are adjudged against James M. Day, Ramona Day, Kenn Goldblatt, George Day, Shirley Long Day, Wilbert of North Texas, Inc., and Indian Villages, Inc., jointly and severally, and all writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary.

All other relief not expressly granted herein is denied.

SIGNED this 11th day of May, 2000.

_____

JUDGE PRESIDING

Approval as to form:

Orsen E. Paxton, III
State Bar No. 15649100
PAXTON-BEAL, LLP
301 S. Center Street, Suite 300
Arlington, TX 76010

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APPENDIX D

Cause No. 90-1522-A-2

IN RE: THE ESTATE OF TOMMY JOE DAY, DECEASED,	§	IN THE PROBATE COURT
JAMES M. DAY AND RAMONA DAY, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF TOMMY JOE DAY	§	
vs.	§	
FRANK D. MCCOWN, BERT GEORGE SHERRY ROUNTREE, JOHN C. APPLE-WHITE, and A&W INDUSTRIES, INC	§	NO. TWO
vs.	§	
INDIAN VILLAGES, INC., SHIRLEY LONG, SHIRLEY LONG as Trustee for the KLUTZ TRUST, KENN GOLDBLATT, GEORGE DAY, and WILBERT OF NORTH TEXAS, INC.,	§	TARRANT COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

The Court reached the following conclusions of law through pre-trial determination. Such conclusions have bearing on the disposition of this case and, thus, are again set forth herein:

1. The Judgment signed in Cause No. 352-122868-89, in the 352nd Judicial District Court of Tarrant County, Texas, has no effect on the ability of Wilbert of North Texas, Inc. to transfer all of its personal property assets to A & W Industries, Inc.

2. Ownership of the personal property of Wilbert of North Texas, Inc. was not affected by the Judgment in Cause No. 352-122868-89.

3. The property pledged to secure the loan from Landmark Life to Wilbert of North Texas, Inc. was adequately described in the Deed of Trust as the real property and fixtures affixed thereto.

4. Kenn Goldblatt's foreclosure on the Deed of Trust lien did not foreclose on any non-fixture personal property on the premises at 827 Dawn Lane, Grapevine, Texas.

5. The doctrine of judicial estoppel was invoked to prevent the Independent Co-Executors of the Estate of Tommy Joe Day and Wilbert of North Texas, Inc. from taking positions inconsistent with the positions held by them in Cause No. 352-122868-89. In that cause the Independent Co-Executors of the Estate of Tommy Joe Day claimed to be the 100% shareholder of the stock of Wilbert of North Texas, Inc., and Wilbert of North Texas, Inc. claimed to be the sole owner of the property located at 827 Dawn Lane.

Additional findings of fact and conclusions of law to the Court's previous determinations.

1. Tommy Joe Day died on June 16, 1990. Finding of Fact

2. James M. Day and Ramona Day are the Independent Co-Executors of the Estate of Tommy Joe Day. Finding of Fact

3. A & W Industries, Inc. (A&W) and Wilbert of North Texas, Inc. (Wilbert) entered into a valid, enforceable Agreement for acquisition of Assets on September 11, 1991. Finding of Fact

4. The executors agreed to a sale price of the assets of Wilbert of $323,000. Finding of Fact

5. The price paid by A&W for the assets of Wilbert was negotiated and agreed to by the parties. Finding of Fact

6. On September 11, 1991 Sherry Rountree was Vice-President of Wilbert. Finding of Fact

7. The Agreement for Acquisition of Assets entered into between A&W and Wilbert attached as Exhibit "A" a

Commercial Lease Agreement containing an obligation to Purchase provision, obligating Wilbert to sell, and A&W to purchase, the real property at 827 Dawn Lane, Grapevine, Texas described as the Leased Premises in te Commercial Lease Agreement. Finding of Fact

8. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Agreement for Acquisition of Assets on behalf of Wilbert. Finding of Fact

9. A&W and Wilbert entered into a valid, enforceable Amendment to the Agreement for Acquisition of Assets on September 11, 1991. Finding of Fact

10. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or) ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Amendment to the Agreement for Acquisition of Assets on behalf of Wilbert. Finding of Fact

11. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the Agreement for Acquisition or Assets by claiming continued ownership of the assets. Conclusion of Law

12. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to issue a Bill of Sale for the assets purchased to A&W on behalf of Wilbert. Finding of Fact

13. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached certain warranties' (either express or implied) contained in the Agreement for Acquisition of Assets and the Bill of Sale. Conclusion of Law

14. A&W is entitled to indemnity and reimbursement pursuant to the Bill of Sale from Wilbert of all funds expended by A&W to defend its title to the assets purchased under the terms of the Agreement for Acquisition of Assets and Amendment to Agreement for Acquisition of Assets. Conclusion of Law

15. A&W and Wilbert entered into the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets on the closing date of October 28, 1991. Finding of Fact

16. The Executors were allowed to review the Commercial Lease Agreement prior to execution of the Agreement. Finding of Fact

17. The Commercial Lease Agreement entered into between A&W and Wilbert is a valid, enforceable lease agreement. Finding of Fact

18. James Day and Ramona Day the Independent Co-Executors of the Estate of Tommy Joe Day authorized (and/or ratified the actions of) Sherry Rountree, as Vice-President of Wilbert, to sign the Commercial Lease Agreement on behalf of Wilbert. Finding of Fact

19. The Obligation to Purchase provision of the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets contained a procedure for determining a sales price for the leased premises. Finding of Fact

20. A&W substantially performed under the terms of the obligation to Purchase provision of the Commercial Lease Agreement. Finding of Fact

21. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day waived (either express or implied) any specific requirements for performance set forth in the obligation to

Purchase provision of the Commercial Lease Agreement. Finding of Fact

22. Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the obligation to Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers. Conclusion of law

23. The breach of the obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties to prevent A&W from being able to purchase the Leased Premises in accordance with the terms of the obligation to Purchase provision of the Commercial Lease Agreement: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

24. The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt on the Leased Premises was the result of a conspiracy to commit fraud among the following parties to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

25. Kenn Goldblatt's foreclosure of the real property described as the Leased Premises in the Commercial Lease Agreement wrongfully deprived A&W of its right to purchase the Leased Premises under the

terms of he Obligation to Purchase Provision of the Commercial Lease Agreement. Conclusion of Law

26. The reasonable market value of the Leased Premises during the period of time in the second half of 1993 when A&W was attempting to purchase the Leased Premises was $150,000. Conclusion of Law

27. The following parties were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

28. All parties found to have conspired to defraud A&W are jointly and severally liable for all damages awarded A&W. Conclusion of Law

29. The conduct of the following parties warrants the assessment of exemplary or punitive damages against them: Kenn Goldblatt, James Day, Ramona Day, George Day, Shirley Long Day, Indian Villages, Inc., Wilbert of North Texas, Inc. Conclusion of Law

30. A&W is entitled to reasonable and necessary attorneys' fees for legal services rendered on behalf of A&W, its officers and directors to enforce the terms of the Commercial Lease Agreement and to defend against the wrongful claims of the Plaintiffs and Intervenor and to respond to appeal. Conclusion of Law

Signed this 31st day of May, 2000.

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JUDGE PRESIDING

APPENDIX E

COURT OF APPEALS

SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-00-243-CV

INDIAN VILLAGES, INC., KENN
S
GOLDBLATT, WILBERT OF NORTH TEXAS, INC., RAMONA DAY, JAMES M. DAY, GEORGE A. DAY, SHIRLEY LONG, AND SHIRLEY LONG AS TRUSTEE FOR THE KLUTZ TRUST

APPELLANT

V.

A&W INDUSTRIES, INC., JOHN C. APPLEWHITE, BERT GEORGE, AND SHERRY ROUNTREE

APPELLEES

FROM PROBATE COURT NO. 2 OF TARRANT COUNTY

OPINION

I. Introduction

Indian Villages, Inc., Kenn Goldblatt, Wilbert of North Texas, Inc., Ramona Day, James M. Day, George A. Day, and Shirley Long,[1] individually and as

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[1]Shirley Long is also known as Shirley Long Day.

trustee for the Klutz Trust (collectively, appellants), appeal from the trial court's judgment for A&W Industries, Inc., John C. Applewhite, Bert George, and Sherry Rountree. We affirm.

II. Background Facts and Procedural History

This appeal has a long and complicated factual and procedural history. The subject of the parties' dispute is the ownership of Wilbert of North Texas, Inc. (WNT), a company that manufactures and sells concrete burial vaults, and the real property on which WNT's plant is located. Originally, WNT was owned by Tommy Joe Day and his brother, George Day. In 1984, Tommy bought George's 50% interest in WNT for $250,000. George's interest included his stock and his interest in WNT's land and building, which are known as the Dawn Lane property. By this purchase, Tommy became the 100% owner of WNT and the Dawn Lane property. After the 1984 sale, someone -possibly George-prepared a deed to the Dawn Lane property, which was signed by George's former and future wife, Shirley Long Day, as a purported officer of WNT. The deed stated that WNT conveyed its property to Indian Villages, a corporation that George controlled and Shirley claimed to own. At that time, it was not uncommon for Shirley to sign documents at George's request or suggestion. The deed was not filed in the Tarrant County deed records until July 1989, even though it was dated May 4, 1985.

In August 1989, Tommy hired attorney Frank McCown to file suit against Shirley and Indian Villages, alleging that the deed to Indian Villages was void because Shirley had no authority to execute it and that the registered agent for WNT had been improperly changed. The suit was filed in the 352nd District Court of Tarrant County on September 8, 1989. George Day and the Klutz Trust were later added as defendants.

Tommy was murdered on June 16, 1990 by Merry Day Freeze, his former step-daughter. A few days earlier, Tommy had consulted with his lawyer about changing his will to remove Ramona Day, his ex-wife and Merry's mother, as a co-executor; but he was killed before he could sign the new will. Two days after Tommy's death, on June 18, 1990, George and Shirley filed two more deeds involving Tommy's property. The deeds purported to have been signed by Tommy in May 1986 and stated that he conveyed both real property and his stock in WNT to the Klutz Trust. The record indicates that George may have eventually been convicted for forging at least one of these deeds.

Tommy's will named another brother, James Day, and Ramona as independent co-executors. James retained McCown to continue the 352nd court suit and to represent him as a co-executor in estate matters. Due to suspicions between James and Ramona, Ramona hired Lyn Ross, the attorney who had prepared Tommy's will, and his lawfirm to represent her in Tommy's

estate matters, The two executors and attorneys divided the duties between them. Ramona and Ross were responsible for preparing and filing the estate's inventory and federal and state estate tax returns, and James and McCown were to handle the sale of WNT and the 352nd court lawsuit.

Very soon, it became apparent that WNT and its property would have to be sold to pay estate taxes. The lawyers advised that these taxes could be paid out over time,[2] but both James and Ramona wanted to pay the estate taxes and wind up the estate as soon as possible. Part of their desire for quick action stemmed from their concerns about personal liability as executors for the estate taxes. James also did not want to sign the estate tax return and inventory due to his concerns about personal liability for statements in the documents. Because both WNT's stock and the Dawn Lane property were tied up in the 352nd court lawsuit, James and Ramona decided to sell only WNT's assets and to lease the Dawn Lane property to the purchaser of the assets until the title issues could be resolved.

Bill Stein was hired as an independent expert to value WNT. Stein was a certified public accountant associated with the Wilbert, Inc. home office.

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[2]Donald R. Williams, a former revenue agent and attorney for the Internal Revenue Service, also testified at trial about the options available to an estate to obtain an extension of time to pay estate taxes.

(WNT is a franchise of Wilbert, Inc.) Stein had evaluated fifteen to twenty Wilbert franchises across the country. Stein valued WNT, including the Dawn Lane property, at $635,000.

Initially, James and Ramona gave Sherry Rountree the option to purchase WNT. As Tommy's former principal employee, Rountree knew the business, and James and Ramona had asked her to continue her employment and run the business after Tommy's death. Rountree eventually declined to purchase WNT, however.

James and Ramona received various inquiries about the possible sale of WNT, which they forwarded to McCown. McCown did not consider any of these inquiries viable except for an offer by John Applewhite and Jack White, who later formed A&W Industries, Inc. A&W knew about the 352nd court litigation and the deeds that had been filed cluding the estate's title to WNT, but was willing to more forward with the sale in time to allow the estate taxes to be paid from the sale proceeds. Consequently, on August 1, 1991, James and Ramona instructed McCown to negotiate the best deal possible with A&W.

Meanwhile, White met with McCown on May 15, 1991 and submitted a letter of intent that did not list a price. A&W later submitted an asset acquisition agreement with a purchase price of $278,000 listed for WNT's

assets, but McCown eventually negotiated a purchase price of $323,000 for the assets.

Attached to the asset acquisition agreement was a commercial lease agreement, which initially contained an option to purchase the Dawn Lane property at a price not to exceed $327,000. Thus, the parties' documents provided that A&W could purchase both WNT's assets and the Dawn Lane property for a total of $650,000. Because the estate attorneys believed it would be more advantageous to the estate to sell the Dawn Lane property to A&W once the title issues were resolved rather than simply lease it to them, the option was changed to an obligation to purchase for $327,000. The estate attorneys discussed this provision with both James and Ramona. Because of this change, A&W's attorney changed the $327,000 sale price from a firm price to a ceiling price, with an election that allowed A&W to trigger an appraisal process if it believed the value of the property had decreased by the time the title was cleared. This change was faxed to McCown just before a meeting of the executors and their lawyers and was discussed at the meeting.

The final version of the asset acquisition agreement with the attached commercial lease agreement was dated September 11, 1991. The commercial lease agreement provided that A&W would pay WNT rent of $1500 per month, pay all property taxes as they became due, and keep the building and

improvements insured. (At the same time., WNT was obligated to pay Landmark Life Insurance Company approximately $5200 per month on its mortgage on the Dawn Lane property.) The closing documents also included a bill of sale, which required all assets purchased by A&W to pass free and clear of all liens, and an amendment to the asset acquisition agreement. The amendment amended section 1.01 (d) of the asset acquisition agreement, which had originally provided that A&W would receive as an asset of WNT

> [a]ll cash received by the Business on or after September 1, 1991, less the ordinary and usual expenses of the Business for the period from September 1, 1991 through the Closing Date[.]

The amendment provided instead that A&W would receive as an asset all cash that WNT received arising from shipments made on or after September 1, 19.91 and that A&W would reimburse WNT at closing for the ordinary and usual business expenses that WNT incurred from September 1, 1991 through the closing date.

There is conflicting evidence in the record concerning when James initially saw, read, and signed the agreement, amendment, and bill of sale and concerning how many versions of the agreement he reviewed. During this time, James was taking various medications for chronic pain and depression. The medications affected his memory, his ability to recall events from 1990 to 1996, and his ability to perform his duties as executor. He was hospitalized for

two weeks in December 1990 for clinical depression and continued to see a psychiatrist and a psychologist for several years thereafter. McCown, Ross, and John Saltarelli, another attorney with Ross's law firm, testified, however, that all the various provisions were discussed and fully explained to both James and Ramona during lengthy executors' meetings. Ramona also testified that the appraisal provision was discussed in executors' meetings at which she and James were present. James admitted that the amendment to the asset acquisition agreement seemed better for WNT than what was in the original asset acquisition agreement.

The sale of WNT's assets was scheduled to close on October 28, 1991. The sale nearly fell apart, however, because Applewhite and White came up $100,000 short in their financing. Finally, within ten days of the closing date, Bert George, Rountree's long-time companion, agreed to put up the remaining money. James did not know about this arrangement.

Neither James nor Ramona attended the actual closing, but they had previously signed a "Consent of Directors and Shareholders," which was attached to the asset acquisition agreement. Ramona signed the consent as a director of WNT, and she and James both signed as executors of Tommy's estate. Rountree, in her capacity as WNT's vice president, signed the closing documents pursuant to this signed consent on WNT's behalf. James knew

beforehand that Rountree would be signing the asset acquisition agreement on WNT's behalf. James could not sign the agreement because he was not an officer of WNT.

A&W paid WNT $323,000 for its assets (excluding the Dawn Lane property). The bank held 10% of this sales price, $32,300, in escrow for six months after the sale. WNT received the remaining $290,700 at closing. WNT and Tommy's estate used this money to pay estate taxes, federal income taxes, and other expenses, the total of which exceeded $300,000.

Pursuant to the amendment to the asset acquisition agreement, A&W was also supposed to have reimbursed WNT at closing for the ordinary and usual business expenses that WNT had incurred from September 1 through October 28, 1991. Instead, Rountree used this money, with James's permission, to pay the balance due on two Mack trucks that WNT was transferring to A&W under the asset acquisition agreement, as well as to bring WNT's mortgage current. (Rountree made these payments because the bill of sale required WNT to transfer all of its assets to A&W free and clear of all liens and other encumbrances.)

In approximately mid-1992, George Day went to federal prison for conspiring to make illegal bank loans.[3]

The 352nd court lawsuit was resolved by an agreed judgment on December 15, 1992. The judgment cleared the way for the sale of the Dawn Lane property by providing that Shirley, Indian Villages, and the Klutz Trust would release and cancel all their claims to the Dawn Lane property, including the cloud created by the deed filed in July 1989,[4] and that the estate owned all of WNT's stock. The judgment also provided that the estate owned the property purportedly conveyed by Tommy to the Klutz Trust in the deeds filed two days after Tommy's death. The agreed judgment also required WNT and the estate to deliver to Shirley deeds to several unrelated properties, but not "until 10 days after this judgment is final by the time for appeal expiring." Finally, the agreed judgment permanently enjoined George, Shirley, Indian

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[3]At the time of trial, George had also been convicted of wire fraud and issuing cashier's checks without authority, and he had been indicted for uttering a forged document, tampering with bail bond and public records, and improperly influencing a grand jury. George's law license was also suspended because of the federal criminal convictions.

[4]The record indicates, however, that this cloud was not removed. A title commitment obtained by McCown in February 1993 still showed Indian Villages as the record owner of the Dawn Lane property. This is the only title commitment McCown obtained.

Villages, and the Klutz Trust from making any further attempts to convey WNT's or the estate's property and from interfering with WNT's business.

After the deeds required in the agreed judgment were signed and delivered to Shirley, the estate told A&W that it was ready to sell the Dawn Lane property. The estate and A&W first attempted to agree on a sale price by offers and re-offers; and then resorted to a modified version of the appraisal procedure outlined in the commercial lease agreement. Neither the estate's attorneys nor Applewhite required strict compliance with the procedural requirements of the appraisal process, such as obtaining a title commitment to begin the process, the use of MAI appraisers,[5] and strict compliance with time periods. Instead, they simply wanted to reach a price at which the sale could be finalized. During this time, McCown and Saltarelli sent letters to James that mentioned the ongoing process to appoint appraisers in order to determine a sale price. James and Ramona discussed the ongoing appraisal process, but neither contacted the estate's attorneys to complain about the modified procedure being used.

In September 1993, in the midst of the offer and appraisal process, McCown realized that he had developed a conflict of interest with James due

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[5]"MAI" stands for "Member of the Appraisal Institute," a professional appraisal organization.

to McCown's representation of A&W and its principals in an unrelated lawsuit. Consequently, he and James terminated their attorney-client relationship. James informed Saltarelli by letter that McCown had a conflict of interest in handling the Dawn Lane property sale, but Saltarelli apparently believed McCown continued to represent James in all other matters. Also, McCown never informed Saltarelli about the conflict of interest, and McCown periodically asked Saltarelli for updates on the status of the sale.

On November 27, 1993, James faxed A&W a hand-written letter halting all negotiations for sale of the Dawn Lane property and requesting information about numerous items. James also stated in the letter that he considered A&W's then current offer for the Dawn Lane property-$102,000-to be an insult. Also on November 27, James faxed a hand-written letter to Saltarelli, stating that Saltarelli did not represent him and that James was "amazed and angry" that Saltarelli had selected an appraiser and was moving forward with the appraisal process. In late December 1993, Ramona fired Ross and Saltarelli from representing the estate. Her decision was based partly on James's concerns and partly on her belief that Ross and Saltarelli were not keeping her properly informed. Ramona also went along with James's decision to cease negotiations for the sale of the Dawn Lane property because she believed the appraisals they were receiving were too low.

In late 1993, George Day got out of prison. While he was still in prison, however, he had telephoned Kenn Goldblatt to thank him for doing some research that George believed was instrumental in eventually "springing" him from the federal penitentiary.

In January 1994, Shirley and Indian Villages sued James, Ramona, and WNT in the 48" District Court of Tarrant County, seeking a declaratory judgment that they had breached the agreed judgment entered in the 352nd court lawsuit and an order setting aside the 352nd court agreed judgment. James hired Keith Woodley to represent him, Ramona, and WNT. In 1992, Woodley had represented Shirley in a suit she had filed against WNT in Brown County, Texas.

Also in early 1994, James contacted Goldblatt for assistance in obtaining from A&W and the fired estate attorneys documents and information about the estate. James had met Goldblatt while Goldblatt was a university student and had supervised Goldblatt's master's thesis in English while teaching at the University of Texas at El Paso. On February 11, 1994, James gave Goldblatt a power of attorney to act for the estate.

Meanwhile, the mortgage on the Dawn Lane property was in default, and Landmark Life Insurance Company, the mortgagor, posted the property for foreclosure in March 1994. James discussed this problem with Goldblatt, who

ultimately avoided the foreclosure sale by purchasing the note on the Dawn Lane property from Landmark Life in late February. Goldblatt paid Landmark Life $35,500 of the $39,000 principal balance owed. Goldblatt restructured the note, dropping WNT's monthly payments from $5,200 to about $750. James was receiving $1,500 per month in rent from A&W, but he refused to cash the checks and made only one $750 note payment to Goldblatt.

In late March 1994, A&W sued WNT, the estate, and Goldblatt in the 141st District Court. A&W alleged breach of contract and sought injunctive relief to prevent Goldblatt from foreclosing on the Dawn Lane property and thereby depriving A&W of its right to purchase the property. This suit was later nonsuited or dismissed. Also in March 1994, Shirley moved for summary judgment on her claims in the 48th court lawsuit.

On April 21, 1994, Goldblatt sent James notice that WNT and the estate were once again delinquent in their note payments. Goldblatt threatened to accelerate the entire $35,500 balance of the note. James did not ask Goldblatt for additional time to bring the note current, nor did he do anything else to address the delinquency. Goldblatt also sent James a notice of sale dated April 26 and a demand for full payment dated April 27, threatening full foreclosure on June 7, 1994. James did nothing to prevent the foreclosure.

At the same time, Goldblatt, James, Ramona, Shirley, Indian Villages, and Woodley were negotiating a new agreement, dated May 30, 1994. This agreement contemplated Goldblatt's foreclosure of the Dawn Lane property and recited that McCown, Ross, their law firms, and Rountree had failed in their respective duties to the estate. The May 1994 agreement also provided that James and Ramona, as the estate's executors, would transfer all of the estate's stock in WNT to Goldblatt and assign all claims the estate or WNT may have against anyone to Goldblatt. James testified that this meant they assigned to Goldblatt any claim for his own wrongful foreclosure of the Dawn Lane property. Also in the May 1994 agreement, Shirley agreed to transfer to Goldblatt all of her stock in WNT, her alleged ownership interest in WNT's other assets, and to assign to him all claims that might be applicable to her ownership of WNT. In the event of foreclosure, Goldblatt agreed to hold the Dawn Lane property in trust for the estate until the estate's beneficiaries received certain amounts of money from WNT's profits. If the estate took possession of the property, James and Ramona agreed to return the property to Goldblatt once the estate's beneficiaries received the aforementioned money from WNT's profits. Goldblatt paid nothing in exchange for these benefits.

Also on May 30, 1994, Goldblatt and George Day entered into an agreement that alleged in pertinent part as follows:

- In the mid-1980s, George had entered into a number of agreements with family members and business associates, including Tommy, to transfer George's property for inadequate or no consideration.
- George made these agreements to preserve his assets and defraud his creditors.
- Among these assets were WNT and the Dawn Lane property, which George had purchased in 1972.
- George and Goldblatt first met in February 1994, when Goldblatt decided to purchase the Landmark Life note Tommy had made on the Dawn Lane property.
- In March 1994, Goldblatt and Tommy's estate had been sued by A&W.
- Goldblatt was aware of the sale of WNT's assets to AW of George's business practices, and of the existing judgments against George. Armed with this knowledge, Goldblatt obtained title to an F.D.I.C. judgment entered against George in Brown County, Texas in February 1990.
- George would assist Goldblatt, as successor to the F.D.I.C. judgment, to recover the assets that George owned or controlled in 1984.
- Among other things, George agreed to: (1) disclose fully to Goldblatt any and all of George's actions concerning his assets and to reveal their true ownership and value; (2) assist in the location of all documents and evidence required to facilitate the recovery of such assets and to support Goldblatt's claims to the assets; (3) fully and cooperatively testify wherever his assistance might be needed to recover anything of value relating to the agreement; and (4) use his business experience and professional knowledge to assist Goldblatt in discovering the most efficient and cost-effective

ways to recover anything of value covered under the agreement.

- In return, Goldblatt would compensate George for his cooperation.

On June 2, Shirley obtained a summary judgment in the 48th court suit. The 48 th court judgment cancelled and set aside the agreed judgment in the 352 nd court suit, decreed that Shirley had owned title to all of the WNT stock since 1983, and decreed that Indian Villages owned the Dawn Lane Property and that the Klutz Trust owned the properties purportedly conveyed to it by Tommy in the deeds filed two days after his death.

On June 7, 1994, Goldblatt foreclosed on the Dawn Lane property. Goldblatt testified that he foreclosed because A&W had filed suit against him, WNT, James, and Ramona, not because of the default on the note. In the underlying case, the trial court granted Goldblatt's motion for a partial summary judgment that his foreclosure of the Landmark Life mortgage cut off all of A&W's claims to any right or obligation to purchase the Dawn Lane property.

A&W's lawsuit ultimately ended up in Probate Court No. 2 of Tarrant County. By the time of trial, A&W was aligned with Applewhite, Bert George, and Rountree (collectively, appellees) against Goldblatt, WNT, Indian Villages, James, Ramona, George, and Shirley (collectively, appellants). After a two month trial, the probate court found in favor of appellees. The trial court

rendered judgment on May 11, 2000 and entered findings of fact and conclusions of law on May 31, 2000. This appeal followed.

III. James and Ramona's Individual Liability

The trial court rendered judgment holding James and Ramona jointly and severally liable with the other appellants for actual damages and attorney's fees and individually liable for punitive damages. James and Ramona contend the trial court erred by rendering judgment against them individually because an estate creditor cannot recover a personal judgment against an estate's legal representatives. See Bailey v. Cherokee CountyApp. Dist., 862 S.W.2d 581, 583 (Tex. 1993) (op. on reh'g) (stating general principle that estate creditor must enforce its claim against estate, where estate assets have not been distributed, rather than against estate's heirs, devisees, legatees, or legal representatives). This legal principle has no application here, however, because A&W's claims are not simply those of a creditor against Tommy's estate. Rather, A&W sued James and Ramona for conspiracy and other wrongful acts that they committed.

An estate executor has been likened to both a trustee and an agent acting on behalf of a principal. Id. at 584 (stating that estate administrator is "an active trustee of the trust estate"); Ward v. Property Tax Valuation, Inc., 847 S.W.2d 298, 300 (Tex. App.-Dallas 1992, writ denied) (analogizing executor's

role to that of agent acting on behalf of principal). Agents and trustees are liable for the torts they commit, and an agent is also liable for breach of contract if the agent has an interest in the subject matter of the contract. See TEX. PROP. CODE ANN. § 114.083(d) (Vernon 1995) (providing that trustee is personally liable for torts committed by trustee or. trustee's agents and employees); Pabich v. Kellar, 71 S.W.3d 500, 507 (Tex. App.-Fort Worth 2002, pet. granted) (op. on reh'g) (noting that courts will hold corporate agent liable where it appears that individual is using corporate entity as a sham to perpetrate a fraud, avoid personal liability, or avoid the effect of a statute); Keyser v. Miller, 47 S.W.3d 728, 732 (Tex. App.-Houston [11" Distj 2001, pet. granted) ("it has long been the law in Texas that a corporate agent knowingly participating in a tortious or fraudulent act may be held individually liable, even though he performed the acts as an agent for the corporation."); City of Houston v. First City, 827 S.W.2d 462, 480 (Tex. App.-Houston [1st Dist.] 1992, writ denied) (noting well-settled exception to Texas law that agent who contracts on behalf of principal is personally liable to other contracting parties where agent has an interest in the subject matter of the contract); see also Cross v. Old Republic Sur. Co., 983 S.W.2d 771, 774 (Tex. App. -San Antonio 1998, pet. denied) (noting with approval probate court's judgment against estate administrator, individually and as estate administrator, for

misappropriating estate funds and willfully failing to perform his administrative duties). Thus, even though James and Ramona were executors of Tommy's estate, they could be held personally liable for fraud, knowing participation in other torts, and breach of a contract in which they had a personal interest. We overrule James and Ramona's arguments to the contrary.

IV. Conspiracy

A. A&W's Pleadings Give Fair Notice of Their Conspiracy Claims

James and Ramona also contend that A&W failed to plead and prove that they engaged in a civil conspiracy. A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573, 583 (Tex. 2001). The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983). James and Ramona assert that neither their breach of their contracts with A&W, their agreement with the rest of appellants to "resist a claim," Goldblatt's purchase of the note on the Dawn Lane property, nor his foreclosure of the Dawn Lane property were unlawful acts.

Texas follows a "fair notice" pleading standard, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant at trial. See Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 896 (Tex. 2000). "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim." Id. at 897 (quoting Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)); see also TEX. R. CIV. P. 47 (providing that a pleading setting forth a claim for relief must contain a short statement of the cause of action sufficient to give fair notice of the claim involved, a statement that the damages sought are within the jurisdictional limits of the court, and a demand for judgment).

A&W alleged in its petition:

- James, Ramona, Goldblatt, and George conspired to void the commercial lease agreement and asset acquisition agreement and to cause A&W's claims or rights under those contracts to become moot. They did this to prevent A&W from purchasing the Dawn Lane property and to evict A&W from continued use of the property.
- In May 1994, just before the foreclosure on the Dawn Lane property, the estate's executors entered into a written agreement with Goldblatt and Shirley, the stated purpose of which was to "recover Wilbert of North Texas, Inc. intact as an operating company" owned by Goldblatt. The May 1994 agreement directly violates the permanent injunction contained in the agreed judgment from the 352nd court lawsuit.
- Pursuant to this conspiracy, the estate's executors allowed, without legitimate

opposition, a summary judgment to be rendered in the 48 th court lawsuit in favor of Shirley, Indian Villages, and the Klutz Trust.

- False representations were made in the 48 th court lawsuit in furtherance of the conspiracy to defraud -A&W of its right to purchase the Dawn Lane property and of its title to the assets it had rightfully purchased from WNT. The 48th District Court relied on the false statements and rendered judgment setting aside the 352nd court agreed judgment.
- A&W was not made a party to the 48th court lawsuit, despite its interest in the Dawn Lane property and WNT's assets.
- George, Shirley, Goldblatt, James, and Ramona conspired to defraud A&W of ownership of the assets rightfully purchased from WNT, to prevent A&W from exercising its contractual right to purchase the Dawn Lane property pursuant to the commercial lease agreement, and to tortiously interfere in the business of A&W by, among other things, conspiring to cut off A&W's property rights to the Dawn Lane property through foreclosure, filing knowingly false inventories, and making sworn false statements.
- Goldblatt's wrongful actions in foreclosing on the Dawn Lane property and purchasing it for himself were the continuation of James and Ramona's wrongful actions and the past and current actions of George and those working on his behalf in their ongoing attempt to divest A&W of ownership of the assets purchased from WNT and its rights to the Dawn Lane property.

These allegations are sufficient to give James and Ramona fair notice of A&W's claims that they, along with the other appellants, had conspired to commit fraud upon the 48th District Court in order to set aside the 352nd court

agreed judgment and thereby unlawfully prevent A&W from exercising its contractual right under the commercial lease agreement to purchase the Dawn Lane property and to unlawfully re-acquire the WNT assets that A&W, had previously purchased from WNT and paid for. We overrule James and Ramona's deficient pleading arguments.

B. Conspiracy to Commit Fraud Upon the 48th District Court

Appellants all contend, however, that because A&W did not plead and prove that they conspired to commit a tortious or unlawful act, they cannot be held liable for conspiracy.

Conspiracy is a derivative tort, not an independent claim. Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996) (op. on reh'g); Bradt v. Sebek, 14 S.W.3d 756, 766 (Tex. App.-Houston [1st Dist.] 2000, pet. denied), cert. denied sub nom., Bradt v. Lilly, 532 U.S. 905 (2001). The gist of a cause of action for conspiracy is damage from the commission of a wrong that injures another and not the conspiracy itself. Laxson v. Giddens, 48 S.W.3d 408, 410 (Tex.App.-Waco 2001, pet. denied); Schoellkopf v. Pledger, 778 S.W.2d 897, 900 (Tex. App.-Dallas 1989, writ denied). Thus, a defendant's liability for conspiracy depends on the commission of some underlying tort or other actionable wrong for which the plaintiff seeks to hold at least one of the named defendants liable. Tilton, 925 S.W.2d at 681 (conspiracy to commit fraud and

intentional infliction of emotional distress); Carroll v. Timmers Chevrolet, Inc., 592 S.W.2d 922, 926 (Tex. 1979) (conspiracy to evade city's wrecker permit ordinance); Berry v. Golden Light Coffee Co., 160 Tex. 128, 327 S.W.2d 436, 438 (1959) (conspiracy to circumvent statutory requirement that a motor carrier must have a permit to transport its goods); Laxson, 48 S.W.3d at 411 (conspiracy to violate DTPA); Schoellkopf, 778 S.W.2d at 900 (conspiracy to tortiously interfere with a contract). Civil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement. Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996).

We hold that A&W's allegations are sufficient to plead a fraud upon the court, which is an actionable unlawful act for which appellants could be held liable. A fraud upon the court occurs when the parties to a lawsuit enter into a sham judgment by agreement, without a fully adversarial trial or without any trial or evidence concerning the merits, because the parties intend to use the judgment against a third party. See State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 705 & n.5, 714 (Tex. 1996) (where plaintiff and defendant insured agreed that sham judgment would be taken against defendant, that defendant would assign his failure-to-defend and denial-of-coverage claims against his insurer to plaintiff, and that plaintiff would not execute on

judgment against defendant, but would instead pursue assigned claims against insurance company). Filing a false, sworn statement for the purposes of influencing a court's decision also constitutes a fraud upon the court. See Sutphin v. Tom Arnold Drilling Contractor, Inc., 17 S.W.3d 765, 768 (Tex. App.-Austin 2000, no pet.); see also Cross, 983 S.W.2d at 774 (where estate administrator perpetrated a fraud on probate court by representing to court that no claims existed against estate, when administrator knew of substantial claims against it). Fraud upon the court is an unlawful act, and a third party who has been injured by the fraud is entitled to judicial relief to remedy the situation. See Gandy, 925 S.W.2d at 705, 714 (allowing insurance company to sue to set aside agreed sham judgment between plaintiff and defendant-insured that was rendered as a result of fraud perpetrated upon the court); Sutphin, 17 S.W.3d at 773 (holding that trial court had inherent power, after its plenary jurisdiction had expired, to investigate whether party had perpetrated a fraud upon the court by filing false affidavits in a special appearance proceeding); Skepnek v. Mynatt, 8 S.W.3d 377, 380-81 (Tex. App.-El Paso 1999, pet. denied) (upholding trial court's imposition of sanctions against parties and their attorney for committing fraud on the court by filing a groundless special appearance motion supported by a false affidavit).

C. Sufficiency of the Evidence to Support Conspiracy Conclusions of Law

The evidence is also legally and factually sufficient to support the trial court's conclusions that appellants conspired to commit fraud upon the 48th District Court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement and to void the asset acquisition agreement; that Goldblatt's purchase and foreclosure of the Landmark Life mortgage was a result of appellants' conspiracy to commit fraud; and that the foreclosure wrongfully deprived A&W of its right to purchase the Dawn Lane property.

1. Standard of Review

Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards that are applied in reviewing evidence supporting a jury's answer. Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994). However, unchallenged findings of fact are binding unless the contrary is established as a matter of law or there is no evidence to support the findings. McGafflard v, Kuhlmann, 722 S.W.2d 694, 696 (Tex. 1986); Reliance Ins. Co. v. Denton Cent. Appraisal Dist., 999

S.W.2d 626, 629 (Tex. App.-Fort Worth 1999, no pet.). Conclusions of law may not be challenged for factual sufficiency, but they may be reviewed to determine their correctness based upon the facts. Forbis v. Trinity Universal Ins. Co., 833 S.W.2d 316, 319 (Tex. App.-Fort Worth 1992, writ dism'd).

2. Evidence

The record shows: In January 1994, Shirley, Indian Villages, and the Klutz Trust filed the 48th court lawsuit, seeking a declaratory judgment that WNT, the estate, James, and Ramona had breached the 352nd court agreed judgment. As a result of this alleged breach, Shirley, Indian Villages, and the Klutz Trust requested an order setting aside and cancelling the 352nd Court agreed judgment. In March 1994, Shirley, Indian Villages, and the Klutz Trust moved for summary judgment. In support of the motion, Shirley stated by affidavit that the estate, James, and Ramona had breached the 352nd court judgment by failing to deliver the deeds described in the agreed judgment within 10 days after the judgment was final, as required by the agreed judgment; as a result of the failure to timely deliver the deeds, the properties were foreclosed on by the lienholders, and Shirley, Indian Villages, and the Klutz Trust suffered $99,000 in damages; the estate, James, and Ramona failed to file a satisfaction and release of the $239,339 money judgment in the agreed judgment and instead requested an abstract of judgment.

The record supports Shirley's allegation about the abstract of judgment. Saltarelli testified at trial that the agreed judgment should have been filed in the deed records office, but that he had mistakenly requested an abstract of judgment instead which he never received.

Regarding Shirley's other allegations, however, the 352nd court agreed judgment did not set a deadline for delivering the deeds, but merely provided that the deeds were not to be delivered until ten days after the judgment was final. Shirley later admitted in court that her affidavit misstated what the agreed judgment said, although she interpreted its language differently. In addition, and more importantly, the executed deeds were delivered to Shirley's lawyer in March 1993, more than ten days after the agreed judgment was final, but ten months before Shirley sued to have the 352nd court agreed judgment set aside and nearly a year before she moved for summary judgment on her declaratory judgment claim. Shirley also admitted that she may not have lost the properties referenced in the deeds until after May 31, 1994-more than two months after she. moved for summary judgment on her declaratory judgment claim. If this was the case, her allegations of damages in the 48th court lawsuit were completely false.

Also, Ramona testified that all of the parties to the 48th court lawsuit agreed to allow Shirley, Indian Villages, and the Klutz Trust to take a summary

judgment against the estate. Ramona testified that she and James agreed to admit that the estate had breached the 352nd court agreed judgment, and WNT, James, and Ramona admitted in their May 23, 1994 response to Shirley's motion for summary judgment that the estate had breached the agreed judgment. In their response, WNT, James, and Ramona attempted to place the blame for their alleged breach on their attorneys.

In addition, James, Ramona, Shirley, Goldblatt, and Tim Morrow, the president and CEO of Indian Villages, entered into the May 30, 1994 agreement in which they agreed to work together "to recover [WNT] intact as an operating company owned by Kenn Goldblatt, Trustee." The agreement recited that Shirley owned stock in WNT and owned other WNT assets-despite the fact that the 352nd court agreed judgment provided that the estate owned all of WNT's stock and permanently enjoined Shirley from claiming any interest in it, and that all of WNT's assets had been sold to A&W in October 1991. The May 1994 agreement also provided that James and Ramona would transfer all of the estate's stock in WNT to Goldblatt and assign all claims the estate or WNT may have against anyone to Goldblatt. Further, Tim Morrow agreed to convey to Goldblatt Indian Villages' deed to the Dawn Lane property. Thus, Goldblatt attempted to acquire 100% of WNT and the deed to the Dawn Lane property via the May 1994 agreement, and he contended at trial that he owned 100%

of WNT. This evidence shows that all of the parties to the 48th court lawsuit and the May 1994 agreement-Shirley, Indian Villages, the Klutz Trust, WNT, James, Ramona, and Goldblatt agreed to make it impossible for WNT to sell the Dawn Lane property to A&W and fraudulently orchestrated the granting of the 48th court judgment to accomplish that objective. This evidence further supports the trial court's conclusion that these appellants conspired to fraudulently void the asset acquisition agreement.[6]

On June 2, 1994, a hearing was held on Shirley's motion for summary judgment in the 48th court lawsuit, and the 48th District Court entered summary judgment for Shirley, Indian Villages, and the Klutz Trust that same day. The 48th court summary judgment cancelled and set aside the 352nd court agreed judgment due to an alleged material breach of the agreement in the judgment, decreed that Shirley owned all of the stock in WNT and had owned it since 1983, and decreed that Indian Villages owned the Dawn Lane property. Thus, the 48th court summary judgment took the Dawn Lane property out of the estate, so that the estate could not sell the property to A&W, and made Indian

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[6]Illogically, Indian Villages asserts that A&W had no right to purchase the Dawn Lane property from WNT because Indian Villages was the record owner of the property pursuant to the 48th court judgment. But Indian Villages conspired with the other appellants before the 48th court judgment was rendered and while the 352nd court judgment, which gave the estate title to the Dawn Lane property, was in effect.

Villages owner of the property. Goldblatt then foreclosed on the property and took it from Indian Villages on June 7. Technically, however, the foreclosure was unnecessary, since Indian Villages had, through Tim Morrow, agreed to convey to Goldblatt the deed to the Dawn Lane property. This evidence supports the trial court's conclusion that James, Ramona, WNT, Goldblatt, and Indian Villages conspired to commit a fraud upon the court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement; that Goldblatt's foreclosure of the Landmark Life mortgage was a result of the conspiracy; and that the foreclosure was wrongful.

Goldblatt, Indian Villages, and Shirley contend that the May 1994 agreement was a legal contract because it was a family settlement agreement, which is a lawfully recognized means of resolving disputes between estate beneficiaries. To support their position, Goldblatt and Indian Villages rely on the family settlement doctrine, which provides that the beneficiaries of a will may agree among themselves on the distribution of the property bequeathed to them, and the agreement may be effected by an agreement not to probate the will. Salmon v. Salmon, 395 S.W.2d 29, 32 (Tex. 1965); Estate of Morris, 577 S.W.2d 748, 755-56 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.). Goldblatt and Indian Villages assert that their participation in the May 1994

agreement, which merely allowed appellants to marshal a joint defense against A&W's claims in the 141st court suit for breach of contract and an injunction, could not constitute a conspiracy. Shirley simply contends that the agreement was not unlawful and that settlement agreements are favored under Texas law. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997) ("It is the policy of this state to encourage the peaceable resolution of disputes ...." Id.).

The family settlement doctrine does not apply here because none of the parties to the May 1994 agreement were beneficiaries of Tommy's will. Tommy's beneficiaries were his biological daughters and former step-daughters. These appellants' arguments also fail, under the circumstances of this case, because they and the other appellants conspired to use and did use the May 1994 agreement as a means to perpetrate a fraud upon the 48th District Court in order to avoid WNT's contract with A&W.

Finally, George and Goldblatt entered into a separate written agreement on May 30, 1994, the same date on which the other appellants entered into their agreement with Goldblatt. George handwrote at least part of the agreement, and Goldblatt typed it up. In their agreement, Goldblatt and George agreed that George would use his professional knowledge to assist Goldblatt in his effort to recover George's scattered assets, including WNT's assets that had been sold to A&W and the Dawn Lane property. In return George would be

compensated by Goldblatt. George testified that part of the purpose of the agreement was to try to regain ownership of WNT and the Dawn Lane property. At the time of this agreement, the 352nd court agreed judgment was still in effect, and that judgment enjoined George from making any further attempts to convey WNT's property or interfere with WNT's business. Further, A&W had bought and paid for WNT's assets two and one-half years earlier. Thus, George and Goldblatt agreed that George would commit unlawful acts that were both prohibited by the 352nd court agreed judgment and directly contrary to the asset acquisition agreement under which A&W had already performed. This evidence supports the trial court's conclusions that George also conspired to commit a fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement and to void the asset acquisition agreement.

The common purpose from which conspiracy liability arises may be established by reasonable inferences. Carroll, 592 S.W.2d at 926; McWhorter v. Sheller, 993 S.W.2d 781, 788 (Tex. App.-Houston [14th Dist.] 1999, pet. denied). Because all of the appellants signed agreements with Goldblatt on the same day that would enable Goldblatt to recover WNT's assets and the Dawn Lane property, despite the existence of the 352nd court judgment, the trial court could reasonably have inferred that all of the appellants conspired to commit a

fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement.

Further, the record shows that both James and Shirley were in contact with George during this time. James testified that he both visited George while he was in prison and talked with him after he got out of prison in December 1993. Shirley testified that she and George were divorced in 1972 and remarried in April 1995, but that even during the time they were divorced they remained "very friendly" and that she served as the trustee for several trusts that George had created, including the Klutz Trust. Shirley further testified that she relied on George and that he advised her regarding the corporations of which she was an officer, such as Indian Villages. James denied knowing in May 1994 that George had signed an agreement with Goldblatt, but the agreement to conspire may be a tacit understanding rather than a formal agreement, and it is not essential that each conspirator have knowledge of the details of the conspiracy. Kirby v. Cruce, 688 S.W.2d 161, 164 (Tex. App.-Dallas 1985, writ ref'd n.r.e.); Bourland v. State, 528 S.W.2d 350, 354 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.).

It is not required that each and every act of a conspirator be shown to have been in concert with the others or that it be established by direct evidence that all combined at a given time prior to each transaction. Inferences of concerted action may be drawn from joint participation in the transactions and from

enjoyment of the fruits of the transactions on the part of the co-conspirators. Int. Bankers Life Ins. Co. v. Holloway, 368 S.W.2d 567, 582 (Tex. 1963); see also Lesikar v. Rappeport, 33 S.W.3d 282, 302 (Tex. App.-Texarkana 2000, pet. denied) (same); St. Gelais v. Jackson, 769 S.W.2d 249, 257 (Tex. App.-Houston [141 Dist.] 1988, no pet.) (holding that the evidence of the interrelationships between the various defendants was sufficient to support the jury's finding that the defendants acted in concert to defraud the plaintiffs through several transactions, even though not all defendants participated in every transaction). All of this evidence supports the trial court's conclusion that the written agreements between the appellants were evidence of their conspiracy to commit fraud.

Moreover, in this case, Goldblatt, at the very least, had full knowledge of all the details of the conspiracy. Once a conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. Carroll, 592 S.W.2d at 926; McWhorter, 993 S.W.2d at 787. Accordingly, appellants are all responsible for each other's acts committed in furtherance of the conspiracy.

3. Fact Findings Regarding Conspiracy

George and Shirley attack the trial court's conspiracy conclusions on the ground that there are no fact findings that they conspired to commit fraud. The case on which George and Shirley rely is not on point. The trial court in that case concluded that a corporation had committed fraud and that its sole owner was jointly and severally liable for the resulting damages, apparently based on an alter ego theory. Light v. Wilson, 663 S.W.2d 813, 814-15 (Tex. 1983). But alter ego was not pleaded, and the trial court did not conclude that the owner had personally committed fraud. Id.

In this case, however, the trial court concluded that all of the appellants, including George and Shirley, conspired to commit fraud to prevent A&W from purchasing the Dawn Lane property and to void the asset acquisition agreement. As an appellate court, we must give effect to the trial court's intended findings if they are supported by the evidence, the record, and the judgment. Black v. Dallas County Child Welfare Unit, 835 S.W.2d 626, 630 (Tex. 1992). This rule is based upon well-settled Texas law that in a nonjury trial every reasonable inference and intendment supported by the record will be drawn in favor of the trial court's judgment. Id. As we have discussed, there is ample evidence to support the trial court's implied findings that George and Shirley conspired to commit fraud. Further, fact findings on the ultimate and

determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law. McAshan v. Cavitt, 149 Tex. 147, 229 S.W.2d 10 16, 1020 (1950); Posner v. Dallas County Child Welfare Unit, 784 S.W.2d 585, 587 (Tex. App.-Eastland 1990, writ denied). We overrule all of appellants' issues concerning conspiracy.

V. Punitive Damages

Goldblatt and Indian Villages challenge the trial court's award of punitive damages, asserting that there is no evidence that they "engaged in any illegal, intentional act directed at A&W. " The evidence of fraud and resulting damages to A&W that we have discussed in section IV is clear and convincing evidence sufficient to support the punitive damages award. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon 1997) (providing that exemplary damages may be awarded if claimant proves harm resulting from fraud by clear and convincing evidence). We overrule Goldblatt's and Indian Villages' arguments regarding punitive damages. We also reject Shirley's argument that the exemplary damages award as to her was improper because the only actual damages the trial court awarded A&W based on her conduct were breach of contract damages. See Meek v. Bishop Peterson & Sharp, P.C., 919 S.W.2d 805, 808 (Tex. App.-Houston [14 th Dist.] 1996, writ denied) (noting that punitive damages are not

recoverable for breach of contract). As we note in our discussion of appellants' breach of contract complaints, the trial court's award for damages caused by breach of the commercial lease agreement implies a finding that the damages were caused by appellants' conspiracy to fraudulently induce the breach. Thus, the actual damages assessed against Shirley were in essence damages for fraud. Fraud damages are available in a case where actual damages are based on an economic breach-of-contract loss, if the loss was caused by fraudulent acts. Formosa Plastics Corp. v. Presidio Eng`rs and Contractors, Inc., 960 S.W.2d 41, 47 (Tex. 1998) (op. on reh'g); Sharpe v. Kilcoyne, 962 S.W.2d 697, 703 (Tex. App.-Fort Worth 1998, no pet.). In turn, punitive damages are available where, as here, the claimant has proved harm resulting from the fraud by clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE ANN. 41.003(a).

VI. Breach of Contract

Attached to the asset acquisition agreement between WNT and A&W as exhibit A was a commercial lease agreement, which contained a provision obligating WNT to sell, and A&W to purchase, the Dawn Lane property. The commercial lease agreement is incorporated into the asset acquisition agreement. The trial court's judgment awards A&W Industries actual damages of $150,000 against James, Ramona, Goldblatt, George, Shirley, Indian

Villages, and WNT, jointly and severally, for breach of the obligation to purchase provision in the commercial lease agreement. But in its conclusions of law, the trial court concluded only that WNT and/or James and Ramona, as the estate's independent co-executors, breached the obligation to purchase provision. The trial court did not conclude that Goldblatt, George, Shirley, or Indian Villages breached the obligation to purchase provision. The trial court did conclude, however, that all of the appellants conspired to commit the fraud that resulted in the breach. The trial court also concluded that all of the appellants were jointly and severally liable for all damages awarded to A&W because of their conspiracy to commit the fraud.

A. WNT's Liability for Breach of Contract

1. Validity of Agreements Between WNT and A&W

WNT contends that the trial court erred in concluding that the asset acquisition agreement, the amendment to the asset acquisition agreement, and commercial lease agreement between WNT and A&W were valid and enforceable. Goldblatt also challenges these conclusions, but he merely adopts WNT's arguments. Consequently, we will only refer to WNT in our discussion. WNT contends that the agreements and the amendment were presumptively fraudulent and therefore void ab initio because McCown and Rountree breached

their fiduciary duties to WNT, James, and Ramona by negotiating and signing the documents.

To support its position, WNT relies on Chien v. Chen, 759 S-W.2d 484 (Tex. App.-Austin 1988, no writ). Chien and the cases on which it is based are not on point, however. They merely stand for the proposition that transactions between a fiduciary and his principal that involve a breach of the fiduciary's duties are presumptively fraudulent and void because of the opportunities presented for fiduciary self-dealing at the principal's expense. Id. at 498 & n.7. In this case, the agreements between WNT and A&W are not between principal and agent. Further, as WNT points out, breach of fiduciary duty is a tort, not a defense to a breach of contract claim asserted by a nonfiduciary third party. Grierson v. Parker Energy Ptrs., 737 S.W.2d 375, 378 (Tex. App.-Houston [14 th Dist.] 1987, no writ); Douglas v. Aztec Petro. Corp., 695 S.W.2d 312, 318 (Tex. App.-Tyler 1985, no writ). Part of WNT's complaint is based on its contention that McCown and Rountree improperly represented or worked for both WNT and A&W at the same time.[7] But absent evidence that any allegedly fraudulent conduct on McCown and Rountree's part.

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[7]For a period of time after the October 28, 1991 closing, Rountree worked for both WNT and A&W and received compensation from both companies.

can be attributed to A&W, WNT cannot avoid its contractual obligations to A&W simply because McCown and Rountree were mutual agents for both WNT and A&W. See Rich v. McMullan, 506 S.W. 2d 745, 749 (Tex. Civ. App. -San Antonio 1974, writ ref'd n.r.e.) (holding that, in the absence of evidence that fraud, if any, of real estate agent relating to modification of contract for sale of property could be attributed to purchasers, sellers could not avoid their obligation under the contract on the ground of the alleged fraud of the parties' mutual agent).

In this case, the only evidence of A&W's alleged collusion with McCown and Rountree came from John White, a disgruntled former employee of A&W. White testified that he, Applewhite, McCown, and Rountree conspired to purchase WNT and the Dawn Lane property at a price under fair market value. White testified that the purpose of the conspiracy was "to get the business as cheap as we possibly could" and that he knew what they were doing was probably illegal, but he did it anyway. White testified that he got out of the conspiracy after two or three months, when he sensed that Applewhite and Rountree had made up their minds that he was not going to continue to be part of the company. White never told Applewhite or Rountree that he wanted out of the conspiracy, however. White's employment with A&W was eventually

terminated. He testified that he did not like Applewhite or Rountree very much because they had swindled him.

Conversely, McCown testified that, although James and Ramona forwarded to him various inquiries they had received regarding the possible sale of WNT, he did not consider any of the inquiries viable except the one from A&W. This was because A&W knew of the 352nd court litigation and the deeds that had been filed clouding the estate's title to WNT, but was still willing to move forward with the sale in time to allow the estate taxes to be paid from the sale proceeds. McCown also testified that the only time he was ever authorized by James and Ramona to negotiate a contract was with A&W and that they instructed him to negotiate the best deal possible. Also, A&W first submitted an asset acquisition agreement with a purchase price of $278,000 listed for WNT's assets, an offer with which James and Ramona were satisfied and wanted to accept. But McCown did not believe it was in the estate's best interest to accept the offer, and he eventually negotiated a purchase price of $323,000 for the assets.

The purchase price for WNT's assets was well above the value of $300,000 that had been placed on the assets by Bill Stein, the independent expert who was hired to value WNT. In addition, the asset purchase price, when combined with the $327,000 projected purchase price for the Dawn Lane

property, equaled $650,000-$15,000 above the $635,000 total valuation that Stein had placed on WNT. Stein testified that McCown did not attempt to coach him or influence his opinion in any way, and there is no other evidence in the record that Stein was improperly influenced by either McCown or Rountree.

Further, White testified that he had discussed his trial testimony with Goldblatt a week or ten days before testifying and that he had sold Goldblatt any ownership interest in A&W that he (White) might have. The trial court stated that it could give little weight to White's testimony because he "came across as too disgruntled and too hostile." The trier of fact has several alternatives available when presented with conflicting evidence: It may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard, 722 S.W.2d at 697. Accordingly, as fact finder, the trial court was free to disbelieve White's testimony and believe McCown's and Stein's testimony.[8]

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[8]WNT and Goldblatt both complain that McCown negotiated Rountree's employment contract with A&W. The portion of the record to which Goldblatt directs us, however, does not support his assertion that this was done without the executors' knowledge or consent. To the contrary, McCown testified that "'James was very persistent and insistent that we protect Sherry in this and that she get an employment contract." McCown testified that he represented Rountree in her employment contract negotiations but that John Andrews, A&W's lawyer, actually drew up the contract.

WNT also complains that Rountree converted the funds due to WNT at closing under the amendment to the asset acquisition agreement and used the money to pay the balance due on two Mack trucks that WNT was transferring to A&W. Rountree testified, however, that she did this with James's permission. Tommy's estate was the sole shareholder in WNT and, as co-executor of the estate, James was the estate's representative. WNT cannot avoid its contractual obligations to A&W based on Rountree's actions that its sole shareholder's representative had approved.[9]

WNT also asserts that Rountree improperly failed to disclose to James and Ramona the fact that the purchase price for WNT's assets and/or the Dawn Lane property was a "much reduced purchase price." WNT infers that one of the reasons for both the reduced purchase price and the failure to disclose was the fact that Rountree's long-time boyfriend, Bert George, owned part of A&W and loaned A&W money. WNT does not direct us to any evidence that Bert George's contribution of capital or his loan to A&W so it could purchase WNT's.

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[9]WNT also contends that, if a contract between it and A&W was formed, WNT's performance was excused by A&W's failure to pay at closing the amounts due WNT under the amendment to the asset acquisition agreement. This argument is defeated by James's approval of Rountree's actions, as discussed above. See, e.g., Rich, 506 S.W.2d at 747 ("It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance.").

assets defrauded WNT of anything. Indeed, as we have previously noted, the evidence shows that, at closing, the purchase price for the assets and the Dawn Lane property was above, not below, the valuation placed on the business by an independent expert.

The rest of the evidence on which WNT relies involving McCown and/or Rountree relates to complaints WNT, James, and Ramona may have had against McCown or Rountree for breach of fiduciary duty, but it is not evidence of any collusive or fraudulent conduct in which McCown, Rountree, and A&W participated together. In addition, the trial court granted WNT, James, and Ramona's motion to dismiss with prejudice all of their claims against McCown, and we will not reconsider those claims here. We overrule WNT's arguments in which it contends that the agreements between it and A&W are void ab initio.

2. Delivery of a Complete Set of Documents

WNT contends that no enforceable contract was ever formed between it and A&W because no one delivered a full and complete copy of the agreements to James and Ramona. WNT contends that a contract is not binding unless the following elements are established: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) communication that each party has consented to the terms of the agreement;

and (5) execution and delivery of the contract with intent that it become mutual and binding on both parties. See Buxani v. Nussbaum, 940 S.W.2d 350, 352 (Tex. App. -San Antonio 1997, no writ); McCulley Fine Arts Gallery, Inc. v. X Partners, 860 S.W.2d 473, 477 (Tex. App.-El Paso 1993, no writ). WNT asserts that, because no complete set of the agreements was ever delivered to James and Ramona, there was no existing contract subject to breach.[10]

As we discuss in section VI(B), Ramona actually signed the agreements at closing as a director of WNT. WNT does not contend that the agreements were not complete at closing; therefore, we fail to grasp how WNT can seriously contend that a complete set of the agreements was never delivered to Ramona. James testified that the obligation to purchase provision and the amendment to the asset acquisition agreement were not in the version of the agreements delivered to him. He testified that he provided the only set of documents he had received to his attorney, but admitted that the documents he was describing had never been offered into evidence at trial. On the other hand, McCown, Ross, and Saltarelli all testified that all the various provisions in the agreements were discussed and fully explained to both James and Ramona during lengthy executors' meetings. This evidence is sufficient to

[10]Indian Villages makes this same complaint without citing any legal authority for it.

show that a complete set of the agreements was delivered to James and Ramona and to support the trial court's findings. We overrule this argument.

3. Ratification of the Commercial Lease Agreement

WNT challenges the legal and factual sufficiency of the evidence to support the trial court's finding that James and Ramona authorized or ratified Rountree's signing of the commercial lease agreement. The record contains ample evidence that James and Ramona consented to, ratified, and approved of WNT's officers signing the asset acquisition agreement, to which the commercial lease agreement was attached and incorporated. Both Rountree and Ramona signed the asset acquisition agreement as WNT's officers, and James and Ramona knew Rountree would be signing on WNT's behalf. This evidence is detailed in our discussion of James and Ramona's breach of contract issues in section VI(B), and we need not repeat it here.[11]

WNT also complains that James and Ramona did not ratify Rountree's signing of the agreement because they lacked full knowledge of all the facts surrounding the transaction, such as Bert George's loan of money to A&W. As WNT points out, however, ratification occurs when a principal, who had no knowledge originally of its agent's unauthorized act, retains the benefits of a

[11]See slip op. at 52-55.

transaction after acquiring full knowledge. Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc., 609 S.W.2d 754, 756 (Tex. 1980); Ebner v. First State Bank, 27 S.W.3d 287, 303 (Tex. App.-Austin 2000, pet. denied). Assuming for argument's sake that WNT's factual contentions about James and Ramona's pre-signing lack of knowledge are correct, WNT and the estate benefitted from Rountree's signing of the agreement when they received the $323,000 purchase price for the assets from A&W. It is undisputed that WNT and James and Ramona, as the estate's representatives, retained these benefits and have never offered to return them, even after learning of Rountree's allegedly unauthorized actions. Accordingly, WNT's complaint is overruled.

4. Enforceability of Option to Purchase Provision

WNT asserts that section 28 of the commercial lease agreement is unenforceable because: (1) section 28 is an option to purchase the Dawn Lane property, which was not supported by independent consideration; (2) A&W materially breached the lease by failing to timely pay the ad valorem taxes and rent required by the lease; (3) section 28 is not a contract because it leaves open a necessary and material term-price-for future determination; (4) WNT neither notified A&W in writing that the title to the Dawn Lane property had been cleared nor delivered to A&W a title commitment, so A&W's obligation to purchase the Dawn Lane property was never triggered; and (5) A&W did not

timely follow the appraisal provision that was to be used if the parties could not agree on a purchase price.[12] All of these arguments fail.

First, WNT's assertion that section 28 is an option to purchase is incorrect. Although section 28 originally contained an option to purchase the Dawn Lane property, the option was changed to an obligation to purchase before the agreement was signed, and the estate attorneys discussed this change with both James and Ramona.

Second, the record does not support WNT's assertion that A&W failed to pay the $1500 per month rent required by the commercial lease agreement. Goldblatt testified that A&W stopped making rental payments from July through December 1993. To support his testimony, Goldblatt produced a hand-written piece of paper with one column of figures on the left-hand side and another on the right. WNT relies on the hand-written document to show that A&W stopped making lease payments. But Goldblatt testified that Rountree had created the document and had told him the figures on the left were the payments that had been made against the lease. The left-hand column shows $1600 payments were made from October 1, 1991 through December 1,

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[12]Indian Villages raises many of these same challenges under its first issue, but cites no legal authority to support them. These arguments fail for the same reasons that WNT's arguments fail.

1993. The figures in the right-hand column, which contains several gaps, were disbursements.

Regarding the ad valorem taxes, there is evidence that A&W paid some, but not all, of the 1992 and 1993 ad valorem taxes late. As a matter of law, however, this breach was not material.[13] In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance. Hemandez v. Gulf Group Lloyds, 875 S.W.2d 691, 692-93 (Tex. 1994). The less the nonbreaching party is deprived of the expected benefit, the less material the breach. Davis v. Allstate Ins. Co., 945 S.W.2d 844, 846 (Tex. App.-Houston [11t Dist.] 1997, no writ). There is no evidence that WNT was deprived of any benefit because of A&W's late payment of some of the ad valorem taxes. In addition, Rountree paid the overdue taxes as soon as she learned of them and all of the taxes and late penalties were paid by March 1994. Also, the reason some of the taxes were paid late was that the taxing notices were sent to Indian Villages instead of WNT. As soon as she discovered this problem, Rountree called the taxing authorities and asked them to correct the mailing address to WNT's address.

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[13]Goldblatt also challenges the validity of the lease on this ground, but he does not brief his complaint.

WNT asserts that even the trial court referred to A&W's performance under the lease as "a clear breach of contract." This contention misstates the record. The trial court made this statement in describing James and Ramona's conduct, not A&W's.

Third, section 28 does not leave a material term open for future determination. Section 28 contains an appraisal mechanism for determining the price to be paid for the Dawn Lane property, up to $327,000. Texas law does not require that a specific dollar amount be agreed upon in order for a contract to be enforceable. Penwell v. Barrett, 724 S.W.2d 902, 905 (Tex. App.-San Antonio 1987, no writ). Rather, a contract is sufficiently definite when it provides a standard to be applied in determining price or specifies that a third person will fix the price. Id.; see also Miga v. Jensen, 25 S.W.3d 370, 376 (Tex. App.-Fort Worth 2000, pet. granted) (stating same regarding other contractual elements).

Fourth, section 28 obligated WNT, not A&W, to notify A&W that the title to the Dawn Lane property had been cleared and to deliver a title commitment to A&W. "it is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance." Rich, 506

S.W.2d at 747. Thus, WNT cannot use its failure to perform these obligations as a basis for contending that the contract is unenforceable.

Fifth, although the obligation to purchase provision in section 28 contains certain time deadlines and other procedures for the appraisal process, neither the estate's attorneys nor A&W required strict compliance with the procedural requirements. Instead, they simply wanted to reach a price at which the sale could be finalized. During this time, McCown and Saltarelli sent letters to James that mentioned the ongoing process to appoint appraisers in order to determine a sale price. James and Ramona discussed the ongoing appraisal process, but neither contacted the estate's attorneys to complain about a modified procedure being used. This evidence supports the trial court's finding that WNT, James, and Ramona. waived any specific requirements for performance set forth in section 28. We overrule WNT.'s, Goldblatt's, and Indian Villages' arguments regarding the validity and enforceability of the agreements between WNT and A&W.

B. James and Ramona's Liability for Breach of Contract

James and Ramona challenge the trial court's conclusion that they personally breached the asset acquisition agreement and the obligation to purchase provision in the commercial lease agreement. They contend that they

cannot be personally liable for breach of the agreements because they were not parties to the agreements.

The record shows that James and Ramona did not sign the asset acquisition agreement, which incorporated the commercial lease agreement. Instead, they signed a consent of WNT's shareholders and directors that consented to, ratified, and approved of the asset acquisition agreement and authorized WNT's officers to sign the agreement. Ramona signed the shareholders and directors' consent in two capacities: as a director of WNT and as an executor of Tommy's estate. James signed only as an executor of the estate. A&W contends that James and Ramona signed as shareholders of WNT, but the consent lists the estate as the only WNT shareholder. James and Ramona merely signed on the estate-shareholder's behalf, as executors.

As executors of the estate, James and Ramona could only be personally liable for a breach of the asset acquisition agreement if: they had expressly or impliedly assumed liability for the agreement; they had contracted in their own names; the principal for whom they were acting was undisclosed; they were authorized to act as the owners of WNT; or they had an interest in the subject matter of the contract. See City of Houston, 827 S.W.2d at 480 (listing these circumstances as exceptions to rule that agent who contracts on behalf of principal is generally not liable to other contracting parties). Here, there is no

evidence that James and Ramona assumed liability for the agreement. Also, it is undisputed that James and Ramona did not contract in their own names and that the principal for whom they were acting, the estate, was disclosed. Likewise, James and Ramona were not authorized to act as the owners of WNT. James testified that he could not sign the agreement because he was not an officer of WNT and that both he and Ramona knew Rountree would be signing on WNT's behalf because she was an officer. Further, there is no evidence that James and Ramona had an interest in the agreement. They were not shareholders in WNT, and they were not beneficiaries of Tommy's estate.

In addition, Ramona's signing of the shareholders and directors' consent as a director of WNT did not render her personally liable on the agreement. Both the asset acquisition agreement and the commercial lease agreement clearly state that they are between WNT and A&W. Where, as here, a contract clearly shows that the corporation is the contracting party, a corporate officer's signature in her official capacity does not render the contract the officer's personal contract. Robertson v. Bland, 517 S.W.2d 676, 679 (Tex. Civ. App.-Houston [Vt Dist.] 1974, writ dism'd). A corporate officer assumes personal responsibility for a corporate transaction either by adding her responsibility to that of her corporate principal, or by tendering her own responsibility for that of the principal. Austin v. Dunnam & Strong, 761

S.W.2d 115, 116 (Tex. App.-Houston [14" Dist.] 1988, no pet.). In this case, there is no evidence that Ramona assumed personal responsibility for WNT's performance under the asset purchase and commercial lease agreements. Thus, she cannot be held liable for breaching the agreements simply because she consented to them as a director of WNT.

The trial court found that James and Ramona, as the estate's executors, authorized Rountree, or ratified her actions, as WNT's vice president, to execute the asset purchase and commercial lease agreements. The trial court did not, however, find any fact that would render James and Ramona personally liable on the agreements. Accordingly, based on the facts found by the trial court, its conclusions that James and Ramona personally breached the asset acquisition agreement and the obligation to purchase provision in the commercial lease agreement are incorrect. See Forbis, 833 S.W.2d at 319 (holding that conclusions of law may be reviewed to determine their correctness based upon the facts).

C. Fraudulently Caused Breach of Contract Damages

James, Ramona, Goldblatt, George, and Shirley all challenge the trial court's $150,000 breach of contract damages award, contending that they cannot be liable for breach of contract damages because they were not parties to any agreement with A&W. As we have discussed, the trial court's

conclusions that James and Ramona personally breached the asset purchase and commercial lease agreements were erroneous. In addition, the trial court did not find that Goldblatt, George, or Shirley were parties to the agreements or conclude that they breached the agreements.

There is, however, ample evidence to support the trial court's conclusions that the breach of the obligation to purchase provision in the commercial lease agreement resulted from appellants' conspiracy to commit a fraud upon the 48th District Court and that appellants are jointly and severally liable for any damages caused by their conspiracy. We have discussed this evidence at length in addressing appellants' challenges to the trial court's conclusions regarding conspiracy. If appellants had not conspired to commit fraud, the commercial lease agreement would not have been breached, and A&W would not have suffered damages because of the breach.

The trial court's judgment awards A&W $150,000 in damages that were caused by the breach. Findings that the breach and the damages were the direct result of appellants' conspiracy may be implied from the above conclusions and this damages award. See TEX. R. Civ. P. 299 (providing that trial court's findings of fact shall form the basis of its judgment and that, when one or more elements of a ground of recovery have been found by the trial court, omitted, unrequested elements, when supported by the evidence, will be

supplied by presumption in support of the judgment); see also Jefferson County v. Sterk, 830 S.W.2d 260, 262 (Tex. App.-Beaumont 1992, writ denied) (holding that finding that tortfeasor acted knowingly and with conscious indifference, as required for mental anguish damages award, could be implied from trial court's finding of damages for mental anguish); Norwood Bldrs., Inc. v. Toler, 609 S.W.2d 861, 862 (Tex. Civ. App.-Houston [14 Ih Dist.] 1980, writ ref'd n.r.e.) (holding that finding of $20,000 in damages to a $60,000 home would support an implied finding that there was no substantial performance of the contract to build the home). Accordingly, even though James, Ramona, Goldblatt, George, and Shirley were not parties to the commercial lease agreement, the trial court did not err by holding them jointly and severally liable with WNT for the damages A&W suffered as a result of the fraudulently induced breach. We overrule James's,

Ramona's, Goldblatt's, George's, and Shirley's breach of contract and actual damages issues.[14]

VII. Attorney's Fees

The trial court concluded that A&W was "entitled to reasonable and necessary attorneys' fees for legal services rendered ... to enforce the terms of the Commercial Lease Agreement and to defend against the wrongful claims of [appellants] and to respond to appeal." James, Ramona, WNT, George, and Goldblatt assert that the trial court erred in awarding A&W attorney's fees because A&W was not entitled-to attorney's fees on its breach of contract claims. James and Ramona also challenge the legal and factual sufficiency of the evidence to support the amount of attorney's fees as being reasonable and necessary. They further contend, as do WNT, Goldblatt, Indian Villages,

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[14]A&W contends that James should at least be held individually liable for tortious interference with the asset purchase and commercial lease agreements. The trial court did not, however, enter any findings of fact or conclusions of law regarding tortious interference nor does A&W contend that it should have done so. A trial court's judgment may not be supported upon appeal on a theory of recovery no element of which has been included in the findings of fact. TEX. R. Civ. P. 299. Further, omitted findings are only supplied if they are necessary to the judgment. In re Doe, 19 S.W.3d 346, 357 (Tex. 2000). No findings regarding tortious interference are necessary to support the trial court's judgment in this case because the trial court did not conclude that James tortiously interfered with the asset purchase and commercial lease agreements.

George, and Shirley, that A&W was required to segregate the fees expended on its breach of contract claims from those expended on its conspiracy claims.

A. Evidentiary Challenge

James and Ramona do not raise any argument or cite any legal authority to support their evidentiary challenge to the reasonableness and necessity of the attorney's fees, so we will not consider that complaint. See TEX. R. App. P. 38.1 (h) (providing that brief must contain a clear and concise argument for contentions made, with appropriate citations to authorities and the record); Page v. Structural Wood Components, Inc., 57 S.W.3d 524, 532 (Tex. App.-Houston [1411 Dist.) 2001, pet. granted) (holding that appellant waived issue by simply raising it and then failing to present any argument or authority in support of it).

Further, Orson E. Paxton, III, A&W's attorney, testified at trial regarding what are usual and customary attorney's fees in Tarrant County for the services he and the other attorneys in his firm had provided. Paxton also testified that A&W had incurred reasonable and necessary attorney's fees through trial in the amount of $517,159.25. In addition, Paxton testified regarding the additional fees that would be incurred if the case was appealed to the court of appeals and the Texas Supreme Court. None of the appellants challenged the reasonableness or necessity of these fees at trial.

Where the testimony of an interested witness regarding the reasonableness and necessity of attorney's fees is clear, positive, and direct, it is taken as true as a matter of law where, as here, the opposing party had the means and opportunity to disprove the testimony but failed to do so. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 882 (Tex. 1990). Testimony concerning usual and customary attorney's fees raises a presumption that the fees are reasonable. Budd v. Gay, 846 S.W.2d 521, 524 (Tex. App. -Houston [141 Dist.] 1993, no pet.). Once unrebutted proof is offered that the attorney's fees are reasonable, the award of attorney's fees is mandatory. Id.; Caldwell & Hurst v. Myers, 714 S.W.2d 63, 65 (Tex. App. -Houston [14th Dist.] 1986, writ ref'd n.r.e.).

B. A&W's Entitlement to Attorney's Fees

The civil practice and remedies code provides that a person may recover attorney's fees from an individual or corporation if the claim is for an oral or written contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (Vernon 1997). To recover attorney's fees under section 38.001, a party must prevail on a cause of action for which attorney's fees are recoverable and recover damages. Green Intl, Inc. v. Solis, 951 S.W.2d 384, 390 (Tex. 1997). We have upheld the trial court's conclusion that WNT breached its agreements with

A&W.[15] Accordingly, the attorney's fee award for A&W against WNT on this basis is correct. Because the evidence does not, however, support a finding that James and Ramona personally breached the commercial lease agreement, A&W was not entitled to attorney's fees against them based on those claims. See Corporate Leasing Intl, Inc. v. Groves, 925 S.W.2d 734, 739 (Tex. App.-Fort Worth 1996, writ denied) (reversing attorney's fee award where parties should not have prevailed in trial court); Victoria Air Conditioning, Inc. v. S. W Tex. Mechanical Insulation Co., 850 S.W.2d 720, 725-26 (Tex. App. - Corpus Christi 1993, writ denied) (holding that appellant was not entitled to attorney's fees under section 38.001(8) because it did not prevail in trial court or on appeal). We sustain James and Ramona's argument that A&W was not entitled to attorney's fees from them based on its breach of contract claims.[16]

A&W also contends, however, that it was entitled to attorney's fees under the declaratory judgments act. James, Ramona, Goldblatt, and WNT all sought declaratory relief against A&W, primarily in the form of a judgment

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[15]See slip op. at 39-52.

[16]To the extent Goldblatt's complaint is based on A&W's breach of contract claims, it is moot because there is no indication in the record that the fee award against Goldblatt arises from A&W's breach of contract claims.

declaring that the commercial lease agreement was void ab initio based on fraud and failure of consideration. George also sought a declaratory judgment that WNT had breached the settlement agreement set out in the 352nd court agreed judgment. A&W prayed for attorney's fees "pursuant to the declaratory judgment sought" as well as based on breach of contract. None of the above parties prevailed in the above declaratory judgment claims against A&W. To the contrary, A&W prevailed in its defense against these claims. The declaratory judgments act provides that, in a declaratory judgment proceeding, a trial court may award reasonable and necessary attorney's fees as are equitable and just. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997). Accordingly, the fact that A&W could not recover attorney's fees against James and Ramona based on breach of contract did not preclude it from recovering attorney's fees against James and Ramona, WNT, Goldblatt, and George under the declaratory judgments act.

Goldblatt asserts that he, too, was entitled to attorney's fees under the declaratory judgments act. He points out that the trial court granted him a partial summary judgment on his claim that his foreclosure of the Landmark Life mortgage cut off A&W's right and obligation to purchase the Dawn Lane property. The declaratory judgments act does not require an award of attorney's fees to the prevailing party, but entrusts such awards to the trial

court's sound discretion. Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998); see also TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (providing that trial court may award equitable and just attorney's fees). We hold that the trial court did not abuse its discretion by refusing to award Goldblatt attorney's fees based on his partial summary judgment.

C. Segregation

A party seeking attorney's fees is ordinarily required to segregate the fees incurred on claims that allow recovery of fees from those that do not. Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997); Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 10-11 (Tex. 1991). But when the claims are dependent upon the same set of facts or circumstances and thus are intertwined to the point of being inseparable, the party suing for attorney's fees may recover the entire amount covering all claims. Aiello, 941 S.W.2d at 73.

In this case, A&W's claims that appellants conspired to defraud the 48th District Court and that James, Ramona, and WNT breached the asset purchase and commercial lease agreements are dependent upon the same complex set of facts and circumstances as James, Ramona, Goldblatt, and WNT's declaratory judgment claims that the commercial lease agreement was void ab initio based on fraud and failure of consideration and George's claims that A&W had breached the settlement agreement in the 352nd court agreed judgment.

As such, all of the parties' claims were inseparably intertwined, and A&W was not required to segregate its attorney's fees expended in successfully defending against the declaratory judgment claims from those expended in enforcing the asset purchase and commercial lease agreements and in prosecuting its conspiracy to defraud claims. Further, Paxton testified on cross-examination that he had not included any fees expended in ancillary proceedings, such as the proceeding to remove James and Ramona as the estate's executors, the 141st court lawsuit to enjoin Goldblatt from foreclosing on the Dawn Lane property, a suit for breach of the injunction in the 352nd court agreed judgment, and various other proceedings that had been filed in other counties, some of which were later transferred to Tarrant County and included in the underlying proceeding. This evidence supports the trial court's conclusion of law regarding attorney's fees. We overrule appellant's issues regarding attorney's fees.

VIII. Joint and Several Liability

George and Shirley contend that they cannot be jointly and severally liable with the other appellants for A&W's damages because they were not more than 50% responsible for those damages. This argument fails.

In its judgment, the trial court stated that no party was more than 50% responsible for A&W's damages. The current version of the proportionate responsibility statute provides that a defendant is not jointly and severally liable

for tort damages unless the percentage of responsibility attributed to the defendant is greater than 50%. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(b) (Vernon 1997). But this version of the statute does not apply to A&W's lawsuit because the lawsuit accrued before September 1, 1995 and was filed in March 1996. Id. § 33.01, historical note (providing that current version of statute does not apply to causes of action that accrued before September 1, 1995 and on which suit was filed before September 1, 1996). Instead, A&W's lawsuit is governed by the version of the statute in effect immediately prior to the 1995 amendments to the statute. Id. The pre-1995 amendment version of the statute provided: "This chapter does not apply to a claim based on an intentional tort or a claim for exemplary damages included in an action to which this chapter otherwise applies." Act of June 3, 1987, 70' Leg., 1" C.S., ch. 2, § 2.05, 1987 Tex. Gen. Laws 41, 41 (amended 1989, 1995, 2001) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 33.002 (Vernon Supp. 2002)). Because fraud and conspiracy are intentional torts, the version of the proportionality statute that governs A&W's claims does not apply to the trial court's damages award. See Firestone Steel Prods. Co., 927 S.W.2d at 617; Schenck v. Ebby Halliday Real Estate, Inc., 803 S.W.2d 361, 370 (Tex. App.-Fort Worth 1990, no writ). We overrule this argument.

IX. WNT's and Goldblatt's Proposed Findings of Fact and Conclusions of Law

In the trial court, Goldblatt filed 55 pages of proposed findings of fact and conclusions of law, and WNT filed 139 pages of proposed findings and conclusions. Goldblatt and WNT contend that the trial court erred by failing to make the findings and conclusionsthat they requested because the findings and conclusions were supported by the evidence at trial. They ask this court to make the findings and conclusions that the trial court. should have made to establish their claims for relief against A&W, Rountree, Applewhite, and/or Bert George.

Neither Goldblatt nor WNT cites a single record reference or legal authority in support of their contentions. See TEX. R. App. P. 38.1 (h). Moreover, even if these issues were properly briefed, we could not grant the relief Goldblatt and WNT request. Findings of fact are the exclusive province of the fact finder. Bellefonte Underwriters Ins. Co. v. Brown, 704 S.W.2d 742, 744-45 (Tex. 1986). A court of appeals cannot make findings of fact; it can only "unfind" facts. Tex. Natl. Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986). Further, many of the requests for findings and conclusions-such as that the agreements between WNT and A&W were presumptively fraudulent and void ab initio, that appellants committed no conspiracy, and that Goldblatt

is entitled to possession of both WNT's assets and the Dawn Lane property -are contrary to the trial court's conclusions that we have determined are supported by the evidence. Accordingly, Goldblatt and WNT were not entitled to findings and conclusions to the contrary. See, e.g., Levine v, Maverick County Water Control, 884 S.W.2d 790, 796 (Tex. App.-San Antonio 1994, writ denied) (holding that party who obtained some of the findings and conclusions it requested was not harmed by trial court's failure to make additional requested findings and conclusions where those findings were contrary to the findings and conclusions already made by the trial court). Finally, the trial court ruled via pretrial order that WNT had no claims against A&W, Rountree, Applewhite, or Bert George because WNT had irrevocably assigned all of those claims to Goldblatt. WNT does not challenge that pre-trial order here. We overrule Goldblatt's and WNT's issues regarding their proposed findings of fact and conclusions of law.

X. Other Evidentiary Challenges

A. Pretrial Conclusions 1, 2, and 5

The trial court reached certain pretrial conclusions of law, which it incorporated into its findings of fact and conclusions of law. WNT challenges three of them: that the 352nd court agreed judgment did not affect WNT's ability to transfer all of its personal property assets to A&W; that ownership of WNT's personal property was not affected by the 352nd court agreed judgment; and that WNT, James, and Ramona

were estopped from taking positions inconsistent with those that they held in the 352nd court lawsuit. WNT asserts that these conclusions are erroneous because the 48th court judgment is a valid, enforceable final judgment as a matter of law. We reject this circular line of reasoning. The 48th court judgment may have set aside the 352nd court judgment as to the parties involved in the 48th court lawsuit, but it did not dictate the effect of the 352nd court judgment in and of itself.

WNT and George also assert that nothing in the findings of fact or conclusions of law addresses the effect that the 48th court judgment had on the settlement agreement contained in the 352nd court agreed judgment. This argument is beside the point, because regardless of the effect the 48th Court judgment had on the 352nd court judgment, A&W was not bound by the 48th court judgment.[17]

The 48th court lawsuit was a declaratory judgment action in which Shirley, Indian Villages, and the Klutz Trust sought a judgment declaring that WNT, James, and Ramona had breached the settlement agreement in the 352nd court agreed judgment and cancelling the 352nd court judgment's award of the

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[17]In its pleadings below, A&W alleged that the trial court had declared the 48th court judgment to be void. We have found no such ruling in the record.

Dawn Lane property and WNT's stock to Tommy's estate. "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a) (Vernon 1997); accord Tex. Ed. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994); see also TEX. R. CIV. P. 39(a) (providing that a person who is subject to process shall be joined as a party to the action if he claims an interest relating to the subject of the action and is so situated that the disposition in his absence may impair or impede his ability to protect that interest)

A&W had an interest in the Dawn Lane property as a lessee in lawful possession of the property under the commercial lease agreement. The 352nd court judgment had also cleared the way for the sale of the Dawn Lane property by providing that Shirley, Indian Villages, and the Klutz Trust would release and cancel all their claims to the Dawn Lane property. Thus, as a prospective purchaser under the obligation to purchase provision in the commercial lease agreement, A&W also had an equitable interest in the Dawn Lane property. See, e.g., Johnson v. Wood, 138 Tex. 106, 157 S.W.2d 146, 148 (1941); Guzman v. Acuna, 653 S.W.2d 315, 319 (Tex. App.-San Antonio 1983, writ dism'd) (both stating that a purchaser under a contract of sale who has not paid the purchase price has an equitable right in the property). A&W also certainly

claimed to have interests that would be affected by the declaratory judgment Shirley, Indian Villages, and the Klutz Trust sought, because it was actively attempting to purchase the Dawn Lane property under the commercial lease agreement. Because of these interests, A&W should have been made a party to the 48th court lawsuit.

"A declaration does not prejudice the rights of a person not a party to the proceeding." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a). Consequently, people are generally not bound by a declaratory judgment rendered in a suit to which they were not parties. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652-53 (Tex. 1996). The doctrine of res judicata creates an exception to this rule by forbidding a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit. Id. People can be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action. Id. at 653; Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 800-01 (Tex. 1992), cert. denied sub nom., Youell & Cos. v. Getty 0# Co., 5 10 U.S. 820 (1993). A&W was not in privity with any of the parties to the 48th court lawsuit. A&W did not control the 48th court suit, its interests certainly were not represented by any party to the 48th court

suit, and it was not a successor in interest to any of the parties to the 48th court suit. Accordingly, A&W was not bound by the 48th court judgment and was not prevented from asserting same in the trial court.

WNT's reliance on Compania Financiara Libano, S.A. v. Simmons, 53 S.W.3d 365 (Tex. 2001) is wholly misplaced. That case involved a suit to enforce terms of a settlement agreement that were not incorporated into an agreed judgment. The supreme court held that settlement terms need not be incorporated into a judgment to be enforceable. Id. at 368. Here, the settlement agreement in the 352nd court lawsuit was incorporated into the 352nd court agreed judgment. In addition, in the 48th court lawsuit, Shirley, Indian Villages, and the Klutz Trust did not seek to enforce the 352nd court settlement agreement or agreed judgment; they sought an order "cancel[l]ing the settlement agreement [and] setting aside and cancelling" the 352nd court judgment. Thus, Compania Financiara Libano is clearly inapposite to this case.

We overrule WNT and George's arguments regarding pretrial conclusions 1, 2, and 5.[18]

WNT also contends that the trial court erred in concluding that the 48th court suit was a collateral attack on the 352nd court agreed judgment. This alleged conclusion is not in the trial court's findings of fact and conclusions of law, so we will not consider WNT's objections to it.

B. Finding of Fact 5

WNT's objections to finding of fact 5 are incomplete and therefore difficult to decipher, but WNT seems to challenge the legal sufficiency of the evidence to support the trial court's conclusion that the parties agreed on the $323,000 price that was paid for WNT's assets. James testified, however, that the purchase price for the assets was $323,000. Ramona equivocated

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[18]WNT, Goldblatt, George, and Indian Villages also contend that A&W had no standing to attack the 352nd court and 48th court judgments because A&W was not a party to these lawsuits. Nothing in the record indicates that A&W ever attacked the 352nd court judgment. Additionally, WNT and Goldblatt's arguments concerning the 48th court judgment fail in light of our holding that A&W was not bound by the 48th court judgment. While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment. The case on which WNT and Goldblatt rely is not on point because it is not a declaratory judgment case and also involved a direct appeal of a judgment by the successor in interest to the judgment debtor. See Gulistan Carpet, Inc. v. Porter, 4 S.W.3d 891, 893 (Tex. App.-Dallas 1999, no pet.). We overrule the no-standing arguments.

about the amount, but she admitted that she signed the asset acquisition agreement, which contained a purchase price of $323,000. This evidence is sufficient to support the trial court's finding.

C. Findings of Fact 9 and 10

WNT challenges the legal and factual sufficiency of the evidence to support the trial court's findings that A&W and WNT entered into the amendment to the asset acquisition agreement on September 11, 1991, that the amendment was enforceable, and that James and Ramona ratified Rountree's signing of the amendment. We have already addressed WNT's no-ratification and presumptive fraud arguments and need not reconsider them here.

Also, WNT once again completely fails to cite any legal authority for its contention that A&W could not have contracted on September 11, 1991 because it was not incorporated until September 24. An agent or the members of an unincorporated association may enter into a contract in the name of a corporation that has not yet been formed. Aloe Ltd., Inc. v. Koch, 733 S.W.2d 364, 366 (Tex. App.-Corpus Christi 1987, no writ). Initially, the agent or members are individually liable for the contract, but once the entity is incorporated and ratifies or derives benefit from the contract, the entity becomes liable for the pre-incorporation acts. Coastal Shutters & Insulation,

Inc. v. Derr, 809 S.W.2d 916, 920 (Tex. App.-Houston [14th Dist.] 1991, no writ); Hutchins v. Grace Tabernacle United Pentecostal Church, 804 S-W.2d 598, 599 (Tex. App.-Houston [1st Dist.] 1991, no writ); Aloe, Ltd., 733 S.W.2d at 366.

In this case, Applewhite and White consented to the asset acquisition agreement on A&W's behalf, and White also signed both that agreement and the amendment. The asset acquisition agreement clearly stated that A&W was not yet incorporated, but would be by the date of closing. A&W was incorporated over a month before the October 28, 1991 closing date. At closing, A&W signed the commercial lease agreement, thereby assenting to it, and also derived benefit from the asset acquisition agreement and the amendment by acquiring WNTs assets and possession of the Dawn Lane property as a lessee. Consequently, we reject WNT's argument.

D. Conclusion of Law 26

WNT asserts that the evidence is factually insufficient to support the trial court's conclusion that the fair market value of the Dawn Lane property during the second half of 1993 was $150,000.[19] The conclusion is supported by the

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[19]Goldblatt raises this same argument in his first issue, once again without the benefit of legal authority.

evidence, however. Steven J. Kunkel, an MAI appraiser, valued the property at $150,000 and submitted a report supporting his valuation.

WNT contends that Kunkle's testimony and valuation are not credible evidence because he used inconsistent valuation methods and based his appraisal on properties that were far removed from the Dawn Lane property in both location and characteristics. WNT does not brief these contentions further, but simply refers us to nearly 170 pages of the reporter's record. We are not required to sift through the record, with no guidance from WNT, for evidence that might call Kunkle's valuation methods or his appraisal into question. Harkins v. Dever Nursing Home, 999 S.W.2d 571, 573 (Tex. App.-Houston [14' Dist.] 1999, no pet.); Hafl v. Stephenson, 919 S.W.2d 454, 467 (Tex. App. - Fort Worth 1996, writ denied). Accordingly, we will not consider this argument.

WNT also complains that the trial court improperly disregarded Goldblatt's testimony about the Dawn Lane property's value. Goldblatt testified via a bill of exception that the fair market rental value of the property was $7,500 per month for both the land and building and $5,500 per month for the building only. Conversely, Kunkle testified regarding the fair market sale value of the Dawn Lane property. Assuming that Goldblatt's testimony was admissible, WNT does not explain how it was evidence of the property's sale value.

Further, the trial court, as the trier of fact, was free to believe Kunkle's testimony and disbelieve Goldblatt's. McGalliard, 722 S.W.2d at 697; Akers v. Stevenson, 54 S.W.3d 880, 884 (Tex. App.- Beaumont 2001, pet. denied); Harvey v. Stanley, 803 S.W.2d 721, 724 (Tex. App.-Fort Worth 1990, writ denied).

E. Other Findings and Conclusions

We have addressed the remainder of WNT's challenges to the trial court's findings of fact and conclusions of law in our disposition of WNT's issues concerning fraud, breach of contract, and attorney's fees. We will not revisit them here. We overrule appellants' other evidentiary issues.

XI. Property Pledged to Secure the Landmark Life Note

The trial court concluded: the property pledged to secure the loan from Landmark Life to WNT was adequately described in the deed of trust as the Dawn Lane property and the fixtures affixed thereto; and Goldblatt's foreclosure on the deed of trust lien did not foreclose on any of the nonfixture personal property on the premises at 827 Dawn Lane. Goldblatt challenges these conclusions and asserts that the trial court erred by failing to conclude that the Landmark Life note was secured by both WNT's assets, which had been sold to A&W, and the Dawn Lane property.

The relevant documents are a real estate lien note dated May 1, 1985, made by WNT and payable to Landmark Life Insurance Company and a deed of trust

securing the note. The security for payment is described in the note as:

> A Deed of Trust of even date herewith, executed by the Maker hereof to DANA SMITH, Trustee, upon the following described real property, to-wit:
>
> SEE ATTACHED EXHIBIT "A" WHICH BECOMES A PART HEREOF FOR ALL INTENTS AND PURPOSES,
>
> and by a Security Interest created and granted in said Deed of Trust upon certain other property therein more fully described.
>
> The Exhibit A attached to the note is a metes and bounds description of the Dawn Lane property. The security interest is described in the last paragraph of the deed of trust:
>
> It is understood and agreed that by this instrument Grantors, in addition to fixing and creating a Deed of Trust lien upon and against the real property herein described, inclusive of all goods which are or are to become fixtures thereon, have also created and granted to the Beneficiary pursuant to the Uniform Commercial Code of Texas a security interest in said goods. [Emphasis added.]

Also, the property description attached to the deed of trust lists the metes and bounds description for the Dawn Lane property and is supplemented by the following language:

> and all improvements now ore [sic] hereafter situated thereon inclusive of all goods which are or are to become fixtures, now or hereafter located in and about such improvements, including, without limitation, all heating, air conditioning, ventilating,
>
> plumbing, electrical fixtures and wiring, replacements thereof and additions thereto, all

> of which Grantors represent and agree are and will be a part of and affixed to said land. [Emphasis added.]

This same property description is used to describe the property transferred to Goldblatt under the transfer of lien from Landmark Life.

When construing a contract, a court's primary concern is to give effect to the written expression of the parties' intent. Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994) (op. on reh'g). The contract must be considered as a whole, and no one phrase, sentence, or section should be isolated from its setting and considered apart from the other provisions. Id. at 133-34. In addition, if the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe it as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

The promissory note and deed of trust to Landmark Life and the transfer of lien to Goldblatt are not ambiguous. They clearly state that the only property subject to the deed of trust lien and Landmark Life's security interest is the Dawn Lane property and the fixtures attached thereto. Accordingly, the trial court's conclusions are correct. See Forbis, 833 S.W.2d at 319.

Not satisfied with the property descriptions set out above, Goldblatt urges us to consider "'both pre-mortgage communications between Tom Day and

Landmark and all subsequent writings," as well as a partial excerpt from an undated financing statement and an affidavit tendered by Landmark Life's former president. None of this evidence was admitted by the trial court, however. Instead, it was only offered as a part of Goldblatt's bill of exception. Goldblatt re-offers the evidence here, but cites no argument or legal authority that would explain why the evidence was erroneously excluded below. Consequently, we will not consider it. TEX. R. App. P. 38.1(h). Moreover, absent fraud, accident, or mistake, none of which are at issue here, parol evidence is not admissible to vary the terms of an unambiguous deed of trust or promissory note. Estes v. Republic Natl Bank of Dallas, 462 S-W.2d 273, 276 (Tex. 1970); Tex. Export Dev. Corp. v. Schleder, 519 S.W.2d 134, 137 (Tex. Civ. App.-Dallas 1974, no writ); Lassiter v. Boxwell Bros., Inc., 362 S.W.2d 884, 886 (Tex. Civ. App.-Amarillo 1962, no writ). We overrule Goldblatt's issues concerning the collateral for the Landmark Life note.

XII. Permanent Injunction

The trial court's judgment permanently enjoined appellants

> from directly or indirectly interfering in any way with the business and operation of A&W Industries, Inc., or the real or personal property of A&W Industries, Inc., including the leased property located at 827 Dawn Lane . . . and from pursuing further claims against A&W Industries, Inc., Bert George, Sherry Rountree, John C. Applewhite, or their attorneys, that are in any way related to the

ownership or operation of A&W Industries, Inc. d/b/a Wilbert of North Texas.

Goldblatt asserts that the trial court erred in granting this permanent injunction for numerous reasons. We disagree: First, Goldblatt contends that the injunction improperly fails to identify the reasons for its issuance and the harm A&W will suffer if an injunction is not issued. These requirements, which are from Texas Rule of Civil Procedure 683,[20] only apply to a temporary injunction in which the relief ordered is ancillary to the ultimate relief sought, and not to permanent injunctions. Spinuzzi v. Town of Corinth., 665 S.W.2d 530, 534 (Tex. App.-Fort Worth 1983, no writ); accord Shields v. State, 27 S.W.3d 267, 273 (Tex. App.-Austin 2000, no pet.); Carrell v. Richie, 697 S.W.2d 43, 45-46 (Tex. App.-Austin 1985, writ ref'd n.r.e.). Both of the cases on which Goldblatt relies are temporary injunction cases. See InterFirst Bank San Felipe v. Paz Constr. Co., 715 S.W.2d 640 (Tex. 1986); Fasken v. Darby, 901 S.W.2d 591 (Tex. App.-El Paso 1995, no writ).

Second, Goldblatt contends that the permanent injunction is vague and overbroad. We disagree and question how the injunction could be more clear.

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[20]Inexplicably, Goldblatt also relies on rule 97(d) as support for his argument. TEX. R. CIV. P. 97(d). This rule governs when pleadings may be amended to include counterclaims. Because Goldblatt offers no explanation for his reliance on this rule, we will not consider it.

Goldblatt's complaint about the use of the term "leased premises" is unfounded because that term was used throughout trial to refer to the Dawn Lane property. Goldblatt's complaint that A&W has wrongfully used the injunction to prevent its eviction for refusing to pay post-judgment rent is also without merit. The trial court has ordered A&W to pay $3150 per month for rent of the Dawn Lane property and further ordered that this amount be credited against the judgment debt Goldblatt owes to A&W.

Goldblatt also contends that the trial court erred in granting the injunction because the trial court clerk has not issued a writ in compliance with rule 687. See TEX. R. Civ. P. 687. Nothing in rule 687 requires a trial court clerk to issue a writ of injunction when a permanent injunction is included in a final judgment. Indeed, rule 687 merely sets out the requirements that must be included in a writ. Id. Rule 688 provides that the trial court clerk "shall issue" a writ, but only in the case of a temporary injunction. TEX. R. Civ. P. 688.

Next, Goldblatt asserts that the permanent injunction is improper because "equity cannot be granted to parties who are without clean hands," and the trial court found that A&W did not have clean hands. The trial court made no such finding, although it did orally rule that it would not grant appellees' request for a constructive trust because "there must be clean hands on the part of the

party requesting it." The court was careful to point out, however, that "these are not my formal findings of fact and conclusions of law."

Further, the clean-hands doctrine is not absolute. Vaughan v. Kizer, 400 S.W.2d 586, 590 (Tex. Civ. App.-Waco 1966, writ ref'd n.r.e.). The principle should not be applied when the party relying on it has not been seriously harmed and the wrong complained of can be corrected without applying the doctrine. Thomas v. McNair, 882 S.W.2d 870, 880 (Tex. App.-Corpus Christi 1994, no writ); 1st Coppell Bank v. Smith, 742 S.W.2d 454, 464 (Tex. App.-Dallas 1987, no writ), disapproved on other grounds, Fortune Prods. Co. v. Conoco, Inc. 52 S.W.3d 671, 678 (Tex. 2000). In this case, Goldblatt complains of no "wrong" except that A&W has refused to pay rent-an argument we have previously rejected.

Goldblatt also contends that a trial court cannot issue an injunction to prevent an eviction suit. Neither of the cases on which he relies is on point, however, because they did not involve a situation in which the party sought to be evicted had been fraudulently deprived of its contractual right to purchase the subject property. See generally Haith v. Drake, 596 S.W.2d 194 (Tex. Civ. App. - Houston [11 Dist.] 1980, writ ref'd n.r.e.); Pruett v. Triton, 124 S.W.2d 868 (Tex. Civ. App. -Galveston 1938, writ dism'd). In this case, the trial court ruled by partial summary judgment that Goldblatt's foreclosure of the Landmark

Life mortgage in June 1994 cut off both A&W's right and obligation to purchase the Dawn Lane property,[21] and A&W has conceded that Goldblatt is the record owner of that property. But the trial court also concluded that Goldblatt's purchase of the Landmark Life note and subsequent foreclosure on the Dawn Lane property was the result of appellants' conspiracy to fraudulently deprive A&W of its right to purchase the property and that the foreclosure wrongfully deprived A&W of this right. We have upheld these conclusions;[22] therefore, this argument also fails.

Goldblatt's last argument under this issue is that the injunction violates his constitutional right to occupy the Dawn Lane property as his business homestead. Goldblatt did not attempt to designate the Dawn Lane property as his business homestead until June 5, 2000. We apply the homestead provisions in effect at the time of his application. In 1999, our constitution was amended to provide that a place or business in a city cannot be designated as a business homestead unless it is part of a ten-acre or less tract of land that

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[21]Without the benefit of legal authority, Shirley argues from this ruling that "'the purchase of the note and foreclosure were entirely proper proceedings." We reject this argument because it is not briefed, TEX. R. APP. P. 38.1 (h), and nothing in the record or the trial court's conclusions supports it.

[22]See slip op. at 26-35, 37.

also includes the owner's home. TEX. CONST. art. 16, § 51 (amended 1999).[23] The Dawn Lane property is in Grapevine, and Goldblatt has resided for years in his home at 3605 Wharton Drive in Fort Worth. Consequently, Goldblatt could not designate the Dawn Lane property as his business homestead.

We hold that the trial court did not abuse its discretion by granting the permanent injunction in its judgment.[24] We overrule Goldblatt's arguments concerning the permanent injunction.

XIII. Legal Justification

Indian Villages asserts that the trial court erred in failing to find that Indian Villages was legally justified in participating in the 48th court lawsuit and in the May 1994 agreement. Indian Villages does not, however, direct us to any place in the record where it requested such findings. As we have previously noted, findings of fact are the exclusive province of the fact finder, not an appellate court. Tex. Nat'l Bank, 717 S.W.2d at 903; Bellefonte

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[23]T1he homestead in a city ... shall consist of [a] lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, that the homestead in a city ... shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business . . . ." Id.

[24]The grant or denial of a permanent injunction is reviewed under an abuse of discretion standard. Operation Rescue-Natl v. Planned Parenthood of Houston, 975 S.W.2d 546, 560 (Tex. 1998); El Paso County Hosp. Dist. v. Gilbert, 64 S.W.3d 200 203 (Tex. App.-El Paso 2001, pet. filed).

Underwriters Ins. Co., 704 S.W.2d at 744-45. Moreover, Indian Villages' contention that it was legally justified in its actions is contrary to the trial court's conclusions regarding conspiracy that we have determined are supported by the evidence. Accordingly, Indian Villages was not entitled to findings and conclusions to the contrary. See Levine, 884 S.W.2d at 796. We overrule this argument.

XIV. Statute of Limitations

George contends that A&W's claims against him are barred by the statute of limitations and that A&W failed to use due diligence in serving him. George also complains that the trial court erred by excluding evidence relevant to his statute of limitations defense.

A&W added George as a defendant in June 1997. George asserts that a fair reading of A&W's pleadings shows that his involvement in a conspiracy to commit fraud occurred no later than May 30, 1994, the date he entered into his agreement with Goldblatt. George further contends that the statute of limitations for civil conspiracy is two years, so A&W's 1997 claims against him were time-barred.

The civil practice and remedies code provides that a person must bring suit for personal injury not later than two years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp.

2002). Based on this section, several Texas courts have held that the statute of limitations for fraud-related conspiracy claims is two years. See, e.g., Mayes v. Stewart, 11 S.W.3d 440, 452-53 (Tex. App. - Houston [14th Dist.] 2000, pet. denied); Chandler v. Chandler, 991 S.W. 2d 367, 394 (Tex. App. - El Paso 1999, pet. denied), cert. denied, 529 U.S. 1054 (2000); In re Estate of Herring, 970 S.W.2d 583, 586 (Tex. App.-Corpus Christi 1998, no pet.); Fisher v. Yates, 953 S.W.2d 370, 381 (Tex. App.-Texarkana 1997), writ denied, 988 S.W.2d 730 (1998); Allen v. City of Midlothian, 927 S.W.2d 316, 322 (Tex. App. -Waco 1996, no writ). Because the statute of limitations for fraud is four years, however, A&W contends that the statute of limitations for conspiracy to commit fraud should also be four years. TEX. CIV. PRAC. & REM. CODE ANN. 16.004(a)(4) (Vernon Supp. 2002); Williams v. Khalaf, 802 S.W.2d 651, 658 (Tex. 1990) (op. on reh'g).[25]

Regardless of whether a two-year or four-year statute of limitations applies, A&W is not barred from recovering against George. Subsumed within the trial court's conclusions that appellants conspired to commit fraud and, as a result, wrongfully deprived A&W of its right to purchase the Dawn Lane

[25] Although the discovery rule applies to conspiracy to commit fraud, A&W does not contend that the discovery rule applies here. Estate of Herring, 970 S.W.2d at 586.

property is an implied finding that appellants, including George, committed fraud. See, e.g., Jefferson County, 830 S.W.2d at 262 (holding that findings that tortfeasor acted knowingly and with conscious indifference could be implied from trial court's award of mental anguish damages). This finding is sufficient to support the trial court's damages award against George. See Mayes, 11 S.W.3d at 453 (holding that, even if plaintiff's claim for conspiracy was time-barred, jury finding of fraud still supported damages award). We overrule this argument.

George also asserts that he was not served until March 1999, and that the trial court improperly refused to admit his evidence to establish this fact. George attempted to call A&W's attorney, Orsen Paxton, III as a witness on the statute of limitations and service of citation issues. The trial court refused to allow Paxton to testify because George had not timely designated Paxton as a witness. On appeal, George does not cite any legal authority to support his contentions that this ruling was erroneous or that the delay in service of process prevented A&W from prosecuting its claims against him. Babcock v. Northwest Memorial Hospital, the only case George cites, deals with limitation of voir dire, not witness designation, offers of proof, or due diligence. 767 S.W.2d 705, 708 (Tex. 1989) (op. on reh'g) Accordingly, we will not consider these arguments. TEX. R. App. P. 38.1 N.

XV. Conclusion

Having disposed of all of appellants' issues on appeal, we affirm the trial court's judgment.

TERRIE LIVINGSTON
JUSTICE

PANEL B: DAY, LIVINGSTON, and GARDNER, JJ.

DO NOT PUBLISH
TEX. R. App. P. 47.3(a)

JUL 18 2002

APPENDIX F

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

May 15, 2003

Mr. Keith Woodley
Woodley & Dudley
200 W. Central
Comanche, TX 76442-0099

Mr. W.T. "Skip Leake, Jr.
Texas Health Resources Tower
611 Ryan Plaza Drive, Suite 610
Arlington, Texas 76006-1786

Mr. Paul Wieneskie
Cribbls & McFarland
1000 W. Abram
Arlington, Texas 76013

RE: Case Number 02-1088
Court of Appeals Number: 02-00-00243-CV
Trial Court Number: 90-1522-C-2

Style: Indian Villages, Inc., Kenn Goldblatt, Wilbert of North Texas, Inc.
v.
A&W Industries, Inc.

Dear Counsel:

Today the Supreme Court of Texas denied both motions for rehearing in the above styled petitions for review.

Sincerely,
Andrew Weber, Clerk
by _____
Jessica L. Vlasac, Deputy

cc: Ms. Suzanne Henderson
Ms. Stephanie Lavake, Clerk
George A. Day Cause No. 90-1522-A-2

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APPENDIX G [EXCERPT]
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH, TEXAS

IN RE:

KENNETH ALLEN GOLDBLATT
a/k/a Professional Presentation Products
a/k/a Slides Too

Case No. 00-43193-BJH-7

A&W INDUSTRIES, INC.
("Plaintiff")

vs.

Adversary No. 00-04126

KENNETH ALLEN GOLDBLATT
("Defendant")

Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits

TO THE HONORABLE JUDGE OF SAID COURT:

[EXCERPT]

[page 12]

13. Curiously, the defendant asserts on page 14 of his motion that a person had no duty to foresee or anticipate that another person will engage in negligent, unlawful or criminal

[page 13]

behavior, citing *Crutcher v. Continental Nat. Bank*, 884 S.W.2d (Tex.App. – El Paso, 1994)[9] The plaintiff has never claimed that the defendant engaged in either negligent, unlawful or criminal behavior. See the claims set out in the original Complaint, and the First Amended Complaint. The defendant has never claimed in any of his pleadings that his conduct was "merely negligent." That defendant had any other claim that he might want to assert was not asserted in the above mentioned Pre-Trial Order that was signed by his former attorney, and approved by Judge Tilman on March 8, 2001. . . .

[9] The defendant also asserts in ¶¶ 87, 88, 91, 92, 94, and 96 of his motion, that plaintiff was in possession of facts that would put a prudent man on inquiry so that A&W was not a "bona fide purchaser"; that debtor had a right to foreclose the property in question; that creditor knew that debtor was owner of the mortgage and had "reserved the right to foreclose the mortgage in the future"; that defendant cannot agree (expressly or tacitly) to commit a wrong about which he has no knowledge; that the trial court failed to find a single overt by Debtor that damaged A&W; and that "Creditor sustained no damages for Debtor in contract or in tort from Debtor, as shown by the very judgment under with Creditor claims." All of these matters were discussed in the Court of Appeals' opinion. One can only assume that the defendant must not read or understand the English language very well.

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
KENNETH ALLEN GOLDBLATT	§	
a/k/a Professional Presentation	§	
Products	§	Case No. 00 43193 BJH 7
a/k/a Slides Too	§	
A & W INDUSTRIES, INC.	§	
("Plaintiff")	§	Adversary No. 00 04126
VS.	§	
KENNETH ALLEN GOLDBLATT	§	
("Defendant")	§	

MEMORANDUM OPINION

Before the Court are debtor/defendant Kenneth Allen Goldblatt's ("Goldblatt") motion for summary judgment and the cross motion for summary judgement filed by plaintiff A & W Industries, Inc. ("A&W"). A&W filed this adversary proceeding seeking a determination that its state court judgment is non dischargeable in Goldblatt's bankruptcy case. The Court heard the summary judgment motions on September 30, 2002. At the conclusion of the hearing, the parties requested the opportunity to submit post hearing briefs. Under an agreed schedule, the last of those briefs was due on October 16, 2002, at which time the Court took the motions under advisement.

This Court has core jurisdiction over this adversary proceeding in accordance with 28 U.S.C. §§ 157 and 1334. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law with respect to the

summary judgment motions in accordance with Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

1. Factual Background

A. The Underlying Judgment

This adversary proceeding continues a lengthy and complex dispute over a commercial lease/purchase agreement for a piece of real property located at 827 Dawn Lane, Grapevine, Texas (the "Property"). The almost 20 year history of this dispute began in 1984 when the first contested transfer of the Property occurred. The dispute entered the judicial system in 1989 when the original transferor filed suit against the transferees alleging void deed. Further complications occurred when the transferor was murdered and his cause of action vested in his probate estate. A&W became involved in 1991 when it entered into the agreement described more fully below and thereby obtained certain rights to the Property. According to the summary judgment record, the Property was originally owned by Wilbert of North Texas, Inc. ("Wilbert"), a corporation formed by brothers Tommy Joe Day and George Day. Certain internal family transactions were intended to grant title to the Property to Tommy Day. However, in 1989, because of either incorrectly completed or fraudulent transactions, the deed or deeds became subject to litigation in the 352nd District Court of Tarrant County, Texas (the "352nd court lawsuit")[1].

[1] Although not relevant here, these deeds also spawned criminal forgery convictions against George Day in Cause No. 12 459, The State of Texas v. George Day, in the 35th Judicial District Court of Brown County, Texas. See A&W's Mem. Brief as to Issue Preclusion, Exhibit A, p. 11.

Tommy Day filed the 352nd court lawsuit against Shirley Long Day (Tommy's sister in law and the purported owner of Indian Villages), Indian Villages, and the Klutz trust (apparently a Day family trust). The 352nd court lawsuit clouded title to the Property.

Tommy Day was murdered in 1990 and a second brother, James, and Tommy's ex wife, Ramona, were named the independent co executors of his estate .2 For tax reasons, the co executors of the estate wanted to sell the estate assets. However, title to the Property was still in dispute. As a result, on September 11, 199 1, Wilbert and A&W "entered into a valid, enforceable Agreement for Acquisition of Assets." See Findings of Fact and Conclusions of Law entered by Probate Court No. Two of Tarrant County, Texas (the "Probate Court") dated May 31, 2000 (the "Findings"), p. 2, ¶ 3. Pursuant to that agreement, A&W agreed to lease the Property and, when the cloud on title was removed, A&W would buy the Property. As the Probate Court found, the Agreement for Acquisition of Assets had "attached as Exhibit 'A' a Commercial Lease Agreement containing an Obligation to Purchase provision, obligating Wilbert to sell, and A&W to purchase, the [Property]." See Findings, p. 3, ¶ 7. The co executors of the estate either "authorized (or ratified the actions of) [the officer of Wilbert] to sign the Agreement for Acquisition of Assets on behalf of Wilbert." See Findings, p. 3, ¶ 8. While A&W and Wilbert amended the original agreement, the Probate Court found that this

amendment was either authorized or ratified by the co executors. See Findings, p. 3, ¶¶ 9 & 10.

On October 28,1991, Wilbert and A&W entered into the Commercial Lease Agreement that had been attached as Exhibit A to the asset acquisition agreement. See Findings, p. 4, ¶ 15. Again, the Probate Court found that the co executors either authorized or ratified that lease. See Findings, p. 4, ¶ 18. A&W then took possession of the Property.

At the risk of oversimplifying the next contorted series of events and legal actions[3], Goldblatt obtained a power of attorney to act for the estate. The mortgage on the Property went into default and the holder of the note and mortgage, Landmark Life Insurance Company ("Landmark"), posted the Property for foreclosure. After discussions with other persons interested in the estate, Goldblatt purchased Landmark's note and thereafter foreclosed on the Property as part of a "conspiracy to commit fraud ... to divest A&W of its right to purchase [the Property]." See Findings, p. 6, ¶ 24.

Various lawsuits were filed in various state courts regarding these events and/or transactions. These lawsuits were consolidated into a single suit in the Probate Court.

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[2] Again, while not directly relevant, Ramona's daughter (Tommy's former step daughter) murdered Tommy. See Opinion (the "Opinion") of the Court of Appeals for the Second District of Texas in Fort Worth (the "Court of Appeals") signed on July 18, 2002 at p. 3. While Tommy had consulted his attorney about changing his will to remove Ramona as a co executor, he was killed before he signed the new will. *Id.*

The Probate Court heard the evidence over twenty nine (29) trial days and entered judgment in A&W's favor on May 31, 2000. Pursuant to the Judgment, A&W was awarded actual damages, punitive damages, and attorney's fees against Goldblatt in the aggregate amount of $1,054,212. 10 (the "Judgment Debt ").[4]

B. Goldblatt's Bankruptcy Case

Goldblatt filed his voluntary petition under chapter I I of the Bankruptcy Code on June 6, 2000, just days after the Probate Court issued the Findings and the Judgment. Thereafter, A&W filed its complaint to determine dischargeability of debt in which it seeks a determination that the Judgment Debt is nondischargeable in Goldblatt's bankruptcy case under §§ 523(a)(2)(A) and/or (a)(6) of the Bankruptcy Code. By Order entered on November 4, 2001, this Court converted Goldblatt's bankruptcy case to a case under chapter 7 of the Bankruptcy Code.

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[3] For a complete discussion of the underlying facts, see the Findings, the Judgment signed by the Probate Court in May 2000 (the "Judgment"), and the 88 page opinion of the Court of Appeals.

[4] The Judgment also provides that these amounts are subject to increase in the event that a party petitions for review by the Texas Supreme Court or appeals the judgment to federal court. See Judgment, p. 3, 8.

C. A&W's Nondischargeability Complaint

As noted previously, A&W contends that the Judgment Debt is nondischargeable in accordance with §§

523(a)(2)(A) and/or (a)(6) of the Bankruptcy Code. As regards its § 523(a)(2)(A) claims, A&W contends that:

> [t]he trial court and the Court of Appeals, expressly found based on the evidence that was admitted in trial that false representations were made to plaintiff by Goldblatt. Moreover, false representations were made by the other parties to secure a sham judgment that was intended to defeat the plaintiffs rights to the Dawn Lane property, and that such acts constituted a conspiracy to defraud the plaintiff. Because of the active conspiracy, Goldblatt is legally bound by the other defendants [sic) actions or conduct which were done in furtherance of their goal to defraud plaintiff. The trial court found by the evidence that the false representations were material, and were relied upon and damaged the plaintiff.

Plaintiffs Response and Cross Motion, p. 3, ¶ 15. A&W further contends that the "actual fraud" standard of § 523(a)(2)(A) is satisfied in light of the state courts' findings of fraud:

> The trial court and the Court of Appeals expressly finds [sic] that the defendant was an active conspirator and intentionally committed the fraudulent and wrongful acts that gave rise to plaintiffs damages. The Court of Appeals could not have legally affirmed the trial court's judgment dated May 11, 2000 unless all of the elements of fraud were found to exist. Moreover the Court of Appeals could not have affirmed the punitive damage

> assessment that is part of the award if there was not a finding of either malicious acts or other aggravating circumstances.

Id., p. 5, ¶ 17 (emphasis in original).

Regarding its § 523(a)(6) claims, A&W contends that the Judgment Debt is based on acts of fraud and civil conspiracy, which are both intentional torts, and that Goldblatt's acts were knowingly and intentionally committed under aggravating circumstances, thereby entitling A&W to punitive damages. See Plaintiffs Response, p. 7, ¶ 9. Thus, according to A&W, the acts underlying the Judgment Debt are "willful and malicious" as required by the Bankruptcy Code and the Judgment Debt is nondischargeable under § 523(a)(6).

On the other hand, Goldblatt contends that: (i) exceptions to discharge should be strictly construed in his favor to further the Bankruptcy Code's policy of providing a debtor with a fresh start; (ii) as the objecting party, A&W must establish the exceptions to discharge upon which it relies by a preponderance of the evidence; and (iii) A&W has not met its burden here because the Findings and the Judgment are not legally sufficient to meet the requirements of either §§ 523(a)(2)(A) or (a)(6) of the Bankruptcy Code. Specifically, Goldblatt argues that:

> [t]he trial court's Judgment of May 11, 2000 [and the Findings of Fact and Conclusions of Law] cites no intentional, illegal or malicious act . . . the trial court made no finding of Debtor's subjective state of mind ... the trial court made no findings of damages in tort,

> but only damages in contract, and none of those damages were attributed to Debtor ... The findings of fact are devoid of any finding of "malice" on the part of any Debtor aligned party, especially Debtor.... The trial court did not find that Debtor made a material representation to Creditor that was false, that Creditor relied on such a statement, or that Creditor suffered any injury as a result of such reliance.

See Debtor's Motion for Summary Judgment and Brief, p. 6, ¶¶ 38 - 41; p. 18, ¶ 90.

Thus, while the parties disagree as to the legal effect of the Findings and the Judgment, the underlying procedural history is not in dispute. In short, the Probate Court entered its Judgment against Goldblatt for civil conspiracy to defraud and awarded A&W actual damages, punitive damages and attorney's fees; the Court of Appeals affirmed the Judgment and has recently denied Goldblatt's motion for rehearing.[5]

II. Legal Analysis

A. The Exceptions to Discharge at Issue Here

Section 523 of the Bankruptcy Code excepts certain types of debts from a debtor's discharge. However, these exceptions to discharge are strictly construed in favor of dischargeability to facilitate a debtor's fresh start. See *Texas Lottery comm'n v. Tran*, 151 F3d 339, 342 (5th Cir.

[5] In a conference call with the parties on October 29, 2002, the Court was advised by Goldblatt's counsel that Goldblatt intends to seek review by the Texas Supreme Court. The Court was further advised that the nondebtor appellants do not intend to seek further review of the Judgment.

1998); In re Hudson, 107 F.3d 355, 356 (5th Cir. 1997).

Under § 523(a), a debtor is denied a discharge for "any debt (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud. . . ." I I U.S.C. § 523(a)(2)(A). Moreover, § 523(a)(6) excepts a debt "for any willful and malicious injury by the debtor to another entity or to the property of another entity" from a debtor's discharge. I I U.S.C. § 523(a)(6). Under both §§ 523(a)(2) and (a)(6), the creditor filing the nondischargeability complaint bears the burden of proof, and to prevail, the creditor must prove its case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991); *FDIC v. Smith (In re Smith)*, 160 B.R. 549, 552 (N.D. Tex 1993), aff'd, 39 F.3d 320 (5th Cir. 1994); *In re Townsley*, 195 B.R. 54, 60 (Bankr. E.D. Tex. 1996); *Everspring Enters., Inc. v. Wang* (*In re Wang*), 247 B.R. 211, 213 14 (Bankr. E.D. Tex. 2000); *Hayden v. Hayden* (*In re Hayden*), 248 B.R. 519, 523 (Bankr. N.D. Tex. 2000).

B. Summary Judgment Standard

In general, summary judgment is proper if the summary judgment record shows that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. Civ. P. 56(b); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Abbot v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). As relevant here, A&W asks this Court to: (i) apply principles of

collateral estoppel (now known as issue preclusion) to the Findings, the Judgment, and the Opinion and (ii) conclude, based on those state court determinations, that the Judgment Debt is nondischargeable in Goldblatt's bankruptcy case.

Issue preclusion will prevent a debtor's discharge in bankruptcy court where the issue has been previously litigated. *Grogan v. Garner*, 498 U.S. 279, 287 88 (1991). To determine whether issue preclusion applies in the bankruptcy case, the court must look to the rules of issue preclusion in the state of the underlying judgment. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982). The Fifth Circuit notes that the "Texas courts have indicated that there is 'little difference' between Texas and federal rules of issue preclusion." *State Farm Fire and Cas. Co. v. Fullerton*, 118 F.3d 374, 383 (5th Cir. 1997) (quoting *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 n. 7 (Tex. 1994)).

Texas law applies issue preclusion when the following elements are met: (i) the issue at stake is the same as the one involved in the prior action; (ii) the issue was actually litigated in the prior action; and (iii) the determination of the issue in the prior action was a pan of the judgment in the earlier action. *Rolex Watch U.S.A., Inc. v. Meece* (*In re Meece*), 261 B.R. 403, 407 (Bankr. N.D. Tex. 2001) (citing *Southmark Corp. v. Coopers and Lybrand* (*In re Southmark*), 163 F.3d 925, 932 (5th Cir. 1999)). In addition, under Texas law, "preclusion includes the inherent issues or elements necessary to establish the

claim." *Samedan Oil Corp. v. Louis Dreyfus Natural Gas Corp.*, 52 S.W.3d 788, 794 (Tex. App. Eastland 2001, pet. denied) (applying res judicata as broader preclusion doctrine); see also *Robinson v. Callender* (*In re Callender*), 212 B.R. 276, 282 (Bankr. W.D. Mich. 1997) (fraud judgment entitled to collateral estoppel effect because "element of materiality is easily and properly inferred. .").

Thus, for a bankruptcy court to apply collateral estoppel or issue preclusion in nondischargeability litigation, the elements that constitute the relevant § 523 claim must have been decided in the underlying litigation, either expressly or as an inherent element of the claim. If the state court decision lacks the specificity required by the Bankruptcy Code, the bankruptcy court cannot determine the judgment debt nondischargeable without making additional factual findings from an evidentiary record made before it. See *In re Miller*, 156 F.3d 598, 606 5th Cir. 1998) cert. denied, 526 U.S. 1016 (1999) (nondischargeability complaint remanded to district court because state court jury findings did not speak to fraudulent intent).

Applying these requirements here, summary judgment in favor of A&W is proper if the underlying state court determinations satisfy the applicable standards for nondischargeability of the Judgment Debt under the Bankruptcy Code. Conversely, summary judgment in favor of Goldblatt is proper if those state court determinations are legally insufficient to satisfy the applicable standards

for nondischargeability of the Judgment Debt under the Bankruptcy Code.

C. The Probate Court Findings and Judgment

Here, the Probate Court found or concluded that:

Goldblatt "wrongfully and intentionally conspired to inflict injury on A&W" see Judgment, p. 2, ¶ 15.

"A&W entered into the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets on the closing date of October 28, 199 1," see Findings, p. 4, ¶ 15;

"A&W substantially performed under the terms of the Obligation to Purchase provision of the Commercial Lease Agreement," see Findings, p. 5, ¶ 20;

"Wilbert and/or James Day and Ramona Day as the Independent Co Executors of the Estate of Tommy Joe Day breached the terms of the Obligation to Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers," see Findings, p. 5, ¶ 22;

"The breach of the Obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties [including Goldblatt] to prevent A&W from being able to purchase the Leased Premises in accordance with the

terms of the Obligation to Purchase provision of the Commercial Lease Agreement see Findings, p. 5, ¶ 23;

"The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt on the Leased Premises was the result of a conspiracy to commit fraud among the following parties [including Goldblatt] to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . .," see Findings, p. 6, 12 5;

"The following parties [including Goldblattl were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert see Findings, p. 6, ¶ 27; and

"The conduct of the following parties [including Goldblatt] warrants the assessment of exemplary or punitive damages against them see Findings, p. 7, ¶ 29.

The Court of Appeals affirmed the Judgment in an 88 page opinion, in which that court concluded that, among other things, "Goldblatt, at the very least, had full knowledge of all the details of the conspiracy," see Opinion, p. 35, and "[t]he evidence of fraud and resulting

damages to A&W that we have discussed in section IV is clear and convincing evidence sufficient to support the punitive damages award," see Opinion, p. 37. Moreover, the Court of Appeals rejected the appellants' contention that the Probate Court's findings were insufficient to support its various conspiracy conclusions, noting

> In this case, however, the trial court concluded that all of the appellants ... conspired to commit fraud to prevent A&W from purchasing the [Property) and to void the asset acquisition agreement. As an appellate court, we must give effect to the trial court's intended findings if they are supported by the evidence, the record, and the judgment.... This rule is based upon wellsettled Texas law that in a nonjury trial every reasonable inference and intendment supported by the record will be drawn in favor of the trial court's judgment. As we have discussed, there is ample evidence to support the trial court's implied findings that [the appellants] conspired to commit fraud. Further, fact findings on the ultimate and determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law.... We overrule all of appellants' issues concerning conspiracy.

See Opinion, pp. 36-37.

D. Application of the Findings and Judgment to the Nondischargeability Complaint

Given A&W's request that this Court apply collateral estoppel principles to these state court determinations and hold the Judgment Debt nondischargeable in accordance with §§ 523(a)(2)(A) and/or (a)(6), this Court will analyze whether Goldblatt's liability for civil conspiracy to defraud under Texas law satisfies the Bankruptcy Code's requirements for nondischargeability at issue here.

1. Section 523(a)(2)(A)

As noted previously, § 523(a)(2)(A) excepts from discharge any debt for "money, property, services, or credit" obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Thus, to be nondischargeable, there must be a debt: (i) owed by the debtor, (ii) for money, property, services, or credit, (iii) that was obtained by false pretenses, a false representation, or actual fraud. The purpose of § 523(a)(2)(A) is to prevent a dishonest debtor from retaining the benefits of money, property, services, or credit obtained by fraudulent means. See COLLIER'S (I 5th ed.) 1523.08[1] [a].

Applying these requirements here, the Court concludes that A&W has not established that the Judgment Debt is excepted from discharge in accordance with § 523(a)(2)(A). First, Goldblatt did not borrow any money from A&W, fraudulently or otherwise. Second, while the Probate Court found that Goldblatt purchased the Landmark note and foreclosed on the Property as part of a "conspiracy to commit fraud ... to divest A&W of its right to purchase [the Property]," the Judgment Debt is based on

Goldblatt's liability for conspiracy to defraud, not a fraudulent foreclosure. Third, Goldblatt did not obtain any services from A&W, fraudulently or otherwise. Finally, A&W did not extend (or renew) credit to Goldblatt. In short, § 523(a)(2)(A) is simply inapplicable to the facts as found by the Probate Court.

In its briefs and at the summary judgment hearing, A&W argued that because the Judgment is based on Goldblatt's fraudulent conduct and/or his co conspirators' false representations, the Judgment Debt qualifies as a debt obtained by fraud or false representations. The Court disagrees. In Grogan v. Garner, 498 U.S. 279, 282 n. 2 (1991), the Supreme Court stated: "[a]rguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6)." In addition, in *In re Chavez*, 140 B.R. 413,420 (Bankr. W.D. Tex. 1992), the court held that "[in order to show a violation of § 523(a)(2), the money [the debt owed] must come to the debtor because of the representation [or fraud]." *Id.* The *Chavez* court also noted that the "mere fact that a liability arises as a consequence of the false representation [or fraud] is not sufficient on its own." *Id.*

A&W also argued that the Supreme Court's holding in *Cohen v. De La Cruz*, 523 U.S. 213 (1998) stands for the proposition that the § 523(a)(2)(A) exception to discharge prevents the discharge of all liability arising from a debtor's fraud. See A&W's Memorandum Brief as

to Issue Preclusion, p. 10. According to A&W, since the Judgment Debt is based on findings of a civil conspiracy to defraud among various parties, including Goldblatt, the Judgment Debt is nondischargeable as a liability arising from fraud within the meaning of Cohen.

Again, the Court disagrees. In Cohen, the Supreme Court held that "[o]nce it is established that specific money or property has been obtained by fraud, however, 'any debt' arising therefrom is excepted from discharge." 523 U.S. at 218. As a result, the Cohen Court held an award of treble damages (arising from the fraudulently obtained money) nondischargeable. Here, however, Goldblatt does not owe a debt to A&W because he fraudulently obtained any money, property, or services from A&W. Thus, Cohen is not controlling.

2. Section 523(a)(6)

As noted previously, § 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." I I U.S.C. § 523(a)(6). In the Fifth Circuit, a ... willful and malicious injury' results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury." *Board of Regents of the Univ. of Texas Sys. v. Walker*, 142 F.3d 813, 823 (5th Cir. 1998) (citing *Kawaauhau v. Geiger*, 523 U.S. 57 (1998)). In this context, "an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *In re Miller*, 156 F.3d

598, 605 (5th Cir. 1998), cert. denied, 526 U.S. 1016 (1999).[5]

Here, the Probate Court found Goldblatt liable as a result of a "conspiracy to commit fraud ... to divest A&W of its right to purchase [the Property]" and/or a "conspiracy to defraud A&W." See Findings, p. 3, ¶¶ 24 & 27. In Texas, civil conspiracy is an intentional tort, see *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996), that has five elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more overt unlawful acts; and (5) damages as a proximate result. See *Leigh v. Danek Medical, Inc.*, 28 F.Supp.2d 401 (N.D. Tex. 1998); *Operation Rescue v. Nat 7 Planned Parenthood of Houston and Southeast Texas, Inc.*, 975 S.W.2d 546 (Tex. 1998); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983).

Significantly, in Texas "[c]ivil conspiracy requires specific intent." *Firestone Steel Prods. Co. v. Barajas*, 927

[6] Prior to its decision in Miller, the Fifth Circuit separately defined willful and malicious; "willful" meant intentional, and "malicious" meant without just cause or excuse. See, e.g., Chrysler *Credit Corp. v. Percy Chrysler Plymouth, Inc.*, 783 F.2d 480, 486 5th Cir. 1986); *Bombardier Capital Inc. v. Black* (*In re Black*), 179 B.R. 509, 5 15 16 (Bankr. E.D. Tex. 1995). However, in Miller, the Fifth Circuit found that its prior "'just cause or excuse' approach is peculiarly inappropriate, however, given the Supreme Court's definition of 'willful ... injury' in *Kawaauhau*. Where injury is intentional, as it now must be under *Kawaauhau*, it cannot be justified or excused." *Miller*, 156 F.3d at 605. Thus, the Miller court adopted the unitary standard for willful and malicious injury quoted above.

S.W.2d at 614. The ... gist of a civil conspiracy' is the injury the conspirators intend to cause." *Id.* (quoting *Triplex*, 900 S.W.2d at 720).

> "For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the beginning of the combination or agreement. One cannot agree, expressly or tacitly, to commit a wrong about which he has no knowledge. Given the specific intent requirement, parties cannot engage in a civil conspiracy to be negligent."

Id. (citations omitted).

The Texas Supreme Court's decision in Firestone Steel came as no surprise because the court had earlier stated the specific intent requirement of civil conspiracy law in Texas. See, e.g., *Triplex Communications*, 900 S.W.2d at 716. But, of even greater significance in the context of nondischargeability litigation in the bankruptcy courts, the *Triplex Communications* court specifically rejected an argument that tortfeasors in a civil conspiracy need only intend to engage in the conduct that resulted in the injury when it stated:

> The gravamen of their argument is that the tortfeasors needed only to intend to engage in the conduct that resulted in the injury. We disagree; civil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at

the inception of the combination or agreement. *Id.* at 719.[7] Similarly, in *Ward v. Sinclair*, 804 S.W.2d 929, 931 (Tex. App. Dallas 1990, writ denied), the court noted that

> "for a defendant to be liable for civil conspiracy to defraud, it must be shown not only that there was such a conspiracy but that the particular defendant charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy and intended to have it brought about."

After considering the Findings and the Judgment in light of these Texas state law requirements, this Court concludes that the Judgment Debt is nondischargeable in accordance with § 523(a)(6) of the Bankruptcy Code. As noted previously, the Probate Court found, among other things, that Goldblatt's actions in purchasing the Landmark note and subsequently foreclosing on the Property "was the result of a conspiracy to commit fraud . . . to divest A&W of its right to purchase the [Property]." See Findings, p. 6, ¶ 24. In light of the underlying state law requirements for a civil conspiracy, the Probate Court's conspiracy findings satisfy the objective substantial certainty of harm or subjective motive to cause harm standard announced by the Fifth Circuit in *Miller*, 156 F.3d at 598, for a debt to be

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[7] Recall the Fifth Circuit's earlier holding in *Board of Regents of the Univ. of Texas Sys. v. Walker*, 142 F.3d at 813, that "'willful and malicious injury' results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury," a holding remarkably similar to the Triplex Communications court's holding that specific intent is required for a civil conspiracy under Texas state law. See p. 13, *supra*.

nondischargeable under § 523(a)(6) of the Bankruptcy Code.

3. Attorney's Fees and § 523(a)(6)

Both Goldblatt and A&W have asked for an award of attorney's fees regarding this nondischargeability litigation. For the reasons set forth below, each party must bear its own expenses and attorney's fees.

Cases brought under federal law are subject to the "American Rule," and the prevailing party ordinarily cannot recover attorney's fees absent specific statutory authority, a contractual right, or special circumstances, such as aggravated conduct. See *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. Of Health and Human Res.*, 532 U.S. 598,602 (2001); *Alyeska Pipeline Serv. Co. v. Wilderness Soc 'y* 421 U.S. 240, 247 (1975). The American Rule applies to litigation in the bankruptcy courts. *In re S.S.*, 271 B.rR. 240, 245 (Bankr. D.N.J. 2002); In re Jordan, 927 F.2d 221 (5th Cir. 199 1); *Crain v. Limbaugh* (*In re Limbaugh*), 15 5 B.R. 952, 961 (Bankr. N.D. Tex. 1994); *Dennison v. Hammond* (*In re Hammond*), 236 B.R. 751, 769 (Bankr. D. Utah 1998). The federal courts have carved out narrow exceptions, such as when a contract or statute provides for attorney's fees; however, none are applicable here. Specifically, neither §§ 523(a)(6) or (a)(2) provides for a recovery of attorney's fees, and there is no general right to recover attorney's fees set forth in the Bankruptcy Code. I I U.S.C. § 523(a)(2), (a)(6); see also *Renfrow v. Draper*, 232 F.3d 688,693 (9th Cir. 2000). Moreover, attorney's fees incurred in litigating

dischargeability issues generally are not recoverable. See *Seimer v. Nangle* (*In re Nangle*), 281 B.R. 654,657 (B.A.P. 8th Cir. 2002) (citing 40 *Sherman v Reilly* (*In re Reilly*), 244 B.R. 46,50 (Bankr. D. Conn. 2000); *In re Carter*, 240 B.R. 767, 770 71 (Bankr. W.D. Mo. 1999).

Here, the filing of this nondischargeability complaint simply vindicated A&W's right to contest the dischargeability of the Judgment Debt, and Goldblatt's opposition did not amount to bad faith litigation. Thus, the Court concludes that neither Goldblatt nor A&W has established an exception to the American Rule and each must bear its own expenses and attorney's fees.

III. Conclusion

When collateral estoppel effect is given to the Findings and the Judgment of the Probate Court, the Judgment Debt must be found nondischargeable in accordance with § 523(a)(6) of the Bankruptcy Code. However, the Judgment Debt is not excepted from discharge in accordance with § 523(a)(2)(A) of the Bankruptcy Code. Moreover, as the prevailing party, A&W is not entitled to recover its reasonable attorney's fees and expenses in bringing this action.

Thus, each of the summary judgment motions must be granted in part and denied in part. Goldblatt's motion for summary judgment will be granted to the extent A&W sought a determination that the Judgment Debt is nondischargeable in accordance with § 523(a)(2)(A). The balance of Goldblatt's motion for summary judgment will be denied. Conversely, A&W's cross motion for summary

judgment will be granted to the extent A&W sought a determination that the Judgment Debt is nondischargeable in accordance with § 523(a)(6). The balance of A&W's cross motion will be denied.

A judgment consistent with this Memorandum Opinion will be entered separately.

Signed: November 7, 2002.

Barbara J. Houser
United States Bankruptcy Judge

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APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
KENNETH ALLEN GOLDBLATT	§	
a/k/a Professional Presentation	§	
Products	§	Case No. 00 43193 BJH 7
a/k/a Slides Too	§	
A & W INDUSTRIES, INC.	§	
("Plaintiff")	§	Adversary No. 00 04126
VS.	§	
KENNETH ALLEN GOLDBLATT	§	
("Defendant")	§	

Order On Plaintiff's and Defendant's
Motions for Summary Judgment

ON the 7th day of November, 2002, the court considered the defendant's motion for summary judgment and the plaintiffs cross motion for summary judgment heretofore filed. After considering each of the motions, the objections to defendant's summary judgment evidence, the responses, the arguments thereon, and the submission of post hearing memorandum briefs from both parties the court determines:

1. That the memorandum opinion filed with the United States Bankruptcy Clerk on November 7, 2002, sets out the court's findings as to this court's jurisdiction, the history of the facts which involve the plaintiff and defendant

that gave rise to the state court judgment against the defendant, and the issues of fact and law that governs this adversary proceeding under the bankruptcy Code;

2. That there are no genuine issues of material fact;

3. That the portion of defendant's motion for summary judgment as to plaintiff's complaint objecting to the discharge of plaintiff s judgment debt owed by defendant under 11 U.S.C. § 523(a)(2)(A) should be granted;

4. That the portion of defendant's motion for summary judgment as to plaintiff's complaint objecting to the discharge of plaintiff s judgment debt owed by defendant under 11 U.S.C. § 523(a)(6) should be denied;

5. That the portion of plaintiffs cross motion for summary judgment as to plaintiffs complaint objecting to the discharge of plaintiffs judgment debt owed by defendant under 11 U.S.C. § 523(a)(2)(A) should be denied;

6. That the portion of plaintiff's cross motion for summary judgment as to plaintiff's complaint objecting to the discharge of plaintiffs judgment debt owed by defendant under 11 U.S.C. § 523(a)(6) should be granted;

7. That both parties competing motions for the award of their reasonable and necessary attorney's fees for such litigation should be denied;

8. That based upon such findings and conclusions, the plaintiff is entitled to entry of a final judgment granting its cross motion for summary judgment objecting to the discharge of the debt owed to plaintiff by defendant.

It is Therefore ORDERED and DECREED that plaintiff A & W Industries, Inc. is granted summary judgment on its complaint objecting to discharge of the judgment debt owed by defendant Kenneth Allen Goldblatt to plaintiff.

It is Further ORDERED and DECREED that plaintiff A & W Industries, Inc. recover its costs of court.

SIGNED this 25th day of November, 2002.

Barbara J. Houser
United States Bankruptcy Judge

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APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
KENNETH ALLEN GOLDBLATT	§	
a/k/a Professional Presentation	§	
Products	§	Case No. 00 43193 BJH 7
a/k/a Slides Too	§	
A & W INDUSTRIES, INC.	§	
("Plaintiff")	§	Adversary No. 00 04126
VS.	§	
KENNETH ALLEN GOLDBLATT	§	
("Defendant")	§	

ORDER DENYING RECONSIDERATION

Before the Court is a Motion for Reconsideration (the "Motion") filed by debtor/defendant Kenneth Allen Goldblatt ("Goldblatt").' On November 8, 2002, the Court entered a Memorandum Opinion disposing of cross motions for summary judgment filed by Goldblatt and the plaintiff A & W Industries, Inc. ("A&W"). In its Memorandum Opinion, the Court ruled that the debt owed by Goldblatt to A&W is nondischargeable under § 523(a)(6) of the Bankruptcy Code. On November 12, 2002, Goldblatt filed the present Motion, which the Court will treat as a motion to alter or amend a judgment under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e). See *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990) (abrogated on other grounds) (federal rules do not recognize a motion for reconsideration per se; when such a motion is filed within ten days of judgment, it is properly treated under Rule 59(e)).

1. On November 25, 2002, the parties agreed on the record at a hearing held in connection with the Trustee's motion to abandon certain property that the Court should consider the motion for reconsideration on the papers, without further oral argument.

2 On November 27, 2002, the Court entered Judgment in accordance with its Memorandum Opinion in favor of A&W. The standard under Rule 59(e) is not as exacting as is the standard prescribed under Rule 60(b), but the movant must demonstrate valid reasons that justify the Court's reconsideration of a prior ruling. *Artemis Seafood, Inc. v. Butcher's Choice, Inc.*, 1999 WL 1032798 (N.D. Tx. Nov. 10, 1999). The grant or denial of such a motion is within the Court's sound discretion. *Weber v. Roadway Exp., Inc.*, 199 F.3d 270 (5th Cir. 2000).

The Court has carefully considered all of the arguments set forth in the Motion, and concludes that the Motion should be denied. While the Court appreciates the opportunity to correct errors of law prior to the filing of an appeal, the Motion does not provide any basis for the Court to conclude that it has erred. Rather, it appears that Goldblatt simply disagrees with the Court's interpretation of the law, which is an issue better suited to an appellate tribunal. Therefore, the Court adheres to its prior ruling and the Motion is denied.

Signed: December 6, 2002.

Barbara J. Houser
United States Bankruptcy Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT

ACTION NO.

VS.

4:03-CV-317-Y

A&W INDUSTRIES, INC.

FINAL JUDGMENT

In accordance with the order issued this dame day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED AND DECREED that the decision of the bankruptcy court is AFFIRMED. All costs of court under 28 U.S.C. S 1920 shall be borne by Appellant.

Signed March 24, 2004.

_____

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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APPENDIX L
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT	§	
	§	
VS.	§	**ACTION NO. 4:03-CV-317-Y**
	§	
A&W INDUSTRIES, INC.	§	

NOTICE OF APPEAL

KENNETH ALLEN GOLDBLATT, Appellant in the above numbered and entitled cause appeals under 28 U.S.C. §158(a) from the Order Affirming Bankruptcy Court Ruling entered on March 24, 2004.

The names of all parties to the Judgment, Order or Decree appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:

A&W Industries, Inc.
827 Dawn Lane
Grapevine, Texas 76051-4124

Frank R. Jelinek
801 East Abram, Suite 102
Arlington, Texas 76010
817-461-1100

Kenneth Allen Goldblatt
3605 Wharton Drive
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Frank P. Hernandez
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214-821-1213

Dated: April 11, 2004

Respectfully submitted,

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APPENDIX M

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-10408

In The Matter Of: KENNETH A. GOLDBLATT
Debtor

KENNETH A. GOLDBLATT
Appellant

v.

A&W INDUSTRIES, INC.
Appellee

United States Court of Appeals
Fifth Circuit
FILED
November 4, 2004
Charles R. Fulbruge III
Clerk

Appeal for the United States District Court for the Northern District of Texas, Fort Worth
4:03-CV-317-Y

Before KING, Chief Judge, and HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

The judgment of the district court affirming the judgment of the bankruptcy court is affirmed for essentially the reasons given by the bankruptcy court in its Memorandum Opinion entered November 7, 2002.

AFFIRMED

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

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(3)

Supreme Court, U.S.
FILED
MAR 7 - 2005
OFFICE OF THE CLERK

No. 04-1053

IN THE

Supreme Court of the United States

KENNETH A. GOLDBLATT,

Petitioner,

v.

A & W INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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801 E. Abram, Suite 102
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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner's list of interested parties contained on page (iii) of his Petition is correct.

Respondent, A & W Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Respondent ("A&W") disagrees with Petitioner ("Goldblatt") in his characterization of the question presented on page (i) of the Petition that the bankruptcy court granted an exception to discharge of a state court judgment for "civil conspiracy to *breach a contract*" as that was not the basis of the state court judgment against him and others. In addition, Goldblatt claims that he ". . . did not participate in any action alleged by the creditor to be a conspiratorial act directed toward the creditor." This statement is directly contrary to the record before this court.[1] The bankruptcy court[2] agreed with the state court and found that Goldblatt was an active participant in the conspiracy.

A&W obtained a money judgment against Goldblatt and other parties in a state court for conspiracy to commit fraud against A&W, which was willful, and malicious, and which knowingly caused A&W to suffer damages. Goldblatt filed a bankruptcy proceeding to discharge the judgment debt. A&W filed an objection to discharge of the judgment debt under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(6) of the Code. The bankruptcy court granted a summary judgment against Goldblatt for the relief sought by A&W under subparagraph (a)(6) in a well reasoned Memorandum Opinion

---

[1] Judgment, Appendix C, parag. 5, pg. 13, with actual damages and punitive damages. Findings of Fact and Conclusions of Law, Appendix D, parag. 23, 24, 25, 27, 28 and 29, on pgs. 23 – 24. Opinion by State Court of Appeals, Appendix E, pgs. 47 – 59. The trial court's findings of fact, conclusions of law and judgment were supported by the evidence. Appendix E, pg. 50.

[2] Memorandum Opinion of Bankruptcy Court [Petitioner 's Appendix H, pg. 134 –136].

[Appendix H] that relied on the state trial court's findings of fact and conclusions of law under the doctrine of issue preclusion [Appendix H, pg. 128 – 129, and Appendix I, ¶ 6 and 8, pg. 142 – 143]. The bankruptcy court's judgment was affirmed by the district court [Appendix K, pg. 147], and by the court of appeals [Appendix_M, pg. 151].

The Court of Appeals correctly affirmed the bankruptcy court's determination that A&W's judgment debt against Goldblatt was non-dischargeable under 11 U.S.C. § 523(a)(6). The bankruptcy court correctly relied upon both existing state law, valid federal case law and a correct interpretation of § 523(a)(6) of the Code to enter judgment on A&W's complaint against the debtor.

Thus, Goldblatt's claims in his petition fail on the merits and rely, in part, on a misstatement of the record.

REASONS FOR DENYING THE PETITION

I. *The Court of Appeals Did Not Commit Error.*

II. *The Bankruptcy Court Did Not Commit Error.*

III. *The Petition Does Not Merit Discretionary Review.*

ARGUMENT

I. The Court of Appeals Did Not Commit Error.

The circuit court of appeals reviewed the entire record before it, and found that the bankruptcy court's determination was legally and factually correct, and that error had not been

committed. Consequently, the court of appeals was compelled to affirm the lower court's decision.

Based on the record and the facts proved, the Court of Appeals correctly decided the case by affirming the bankruptcy court. [Appendix M, pg. 151] Mr. Goldblatt improperly "skews" the facts so that he can attempt to contend that this is a case of first impression and have the writ granted.

It is clear that Mr. Goldblatt was a direct, active participant in the conspiracy against A&W that intentionally attempted to deprive A&W of the business assets that it had legitimately purchased from Wilbert of North Texas, Inc. ("Wilbert" or "WNT"). In addition, Mr. Goldblatt conducted a fraudulent foreclosure of a mortgage lien that successfully prevented A&W from consummating the purchase of the real estate (second phase) where that business was located and operated. [Appendix H, pg. 120]. Thus, Mr. Goldblatt's argument is based on a false premise, and misstates the record and/or ignores the correct holding in the lower courts.

Mr. Goldblatt contends that the Fifth Circuit should have relied on the law in other circuits rather than its own precedent[3] in affirming the bankruptcy court. The *Miller* case, and its progeny, which was relied upon by the bankruptcy court and the Fifth Circuit Court of Appeals, is not in a real or direct conflict with the other circuits.[4]

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[3] *In the Matter of Miller*, 156 F.3d 598, 603 (5th Cir. 1998), 33 Bankr. Ct. Dec. 282, *cert. denied*, 526 U.S. 1015, 119 S. Ct. 1249, 143 L. Ed. 2d 347 (1999).

[4] *See* section III of this brief.

II. The Bankruptcy Court Did Not Commit Error.

Based on the record and the facts proved, which are set forth in the Memorandum Opinion, the bankruptcy court did not commit error in granting A&W's cross motion for summary judgment against Goldblatt pursuant to 11 U.S.C. § 523(a)(6) of the Code [Appendix H, pg. 133 – 137].

Goldblatt argues that (a) this is a case of first impression; and (b) that because he did not have a direct, *contractual* relationship with A&W, then he can not be held liable for conspiracy to commit fraud against A&W, and that, as a consequence, the bankruptcy court must have erred. As to the second proposition that simply is not the law, either in the lower circuit courts, or the state of Texas. As stated in the opinion of the state court of appeals, conspiracy does not exist by itself as a separate tort, but must exist in conjunction with another separate wrongful act. [Appendix E, pg. 47]. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996); *Bradt v. Sebek*, 14 S.W.3d 756, 766 (Tex. App. – Houston [1st Dist.] 2000 pet. denied), *cert. denied sub nom.*, *Bradt v. Lilly*, 532 U.S. 905 (2001).

As to the first proposition, the Court is respectfully directed to *Matter of Davis (Sheerin v. Davis)*, 3 F.3d 113 (5th Cir. 1993), 29 Collier Bankr. Cas.2d 1306, 24 Bankr. Ct. Dec. 1108, opinion by Judge Higginbotham, which is factually similar to the case at bar. Sheerin sued Davis for conspiracy to commit fraud and breach of fiduciary duty in a Texas court and obtained a judgment because the defendant tried to "freeze out" the plaintiff, minority shareholder.[5]

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[5] *Davis v. Sheerin*, 754 S.W.2d 375, 382 (Tex. App. – Houston [1st Dist.] 1988, *writ denied*).

The parties were co-owners of the stock in a company and in certain land. In subsequent bankruptcy proceedings, the judgment was held to have preclusive effect when Sheerin sought to have the judgment excepted from discharge under § 523(a)(4) and (6). Because the lower court's holding as to sub-paragraph (4) was upheld, it was not necessary to reach the defendant's claims under sub-paragraph (6).

Next, Mr. Goldblatt attacks the state court judgment as being "factually flawed and legally erroneous"[6] so that it can not be used as a basis for collateral estoppel as to § 523(a)(6). Finally, Mr. Goldblatt contends that the bankruptcy court should not have relied on state law to establish the elements of A&W's complaint as to non-dischargeability of the debt under § 523(a)(6).[7]

First, federal law requires that the bankruptcy court must give full faith and credit to the state court judgment and its underlying factual basis. 28 U.S.C. § 1738. *Marrese v. Amer. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1984); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984).

---

[6] On Page 2 of Goldblatt's Petition he contends that it was "chronologically impossible" for him to be a part of the alleged conspiracy. This contention constitutes a collateral attack on a *final* judgment. *Gober v. Terra + Corporation, infra.* Moreover, Goldblatt complains that the state court of appeals found facts in support of the non-jury verdict based on the findings of fact and conclusions of law that were supplied by implication. The Texas rules of civil procedure permit this. Tex. R. Civ. Proc. 299.

[7] On page 5 of Goldblatt's Petition he states that the bankruptcy court and appellate court erroneously sanctioned the use of state law over federal law when existing case law requires the opposite.

Second, the elements that are required to be shown on an objection to discharge under § 523(a)(6) are:

a) A willful, intentional injury, as distinguished from a negligent or accidental injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90, 38 Collier Bankr. Cas. 2d 1629 (1998). Thus, the actor must intend the *consequences* of his acts (*i.e.*, foreseeability), and not simply intend the act itself.

b) The injury must have been committed with malice. *In the Matter of Miller, supra.* However, malice is not limited to affirmative acts of ill will or spite but "may be *inferred* from objective circumstantial evidence which can override a defendant's protestations of good faith." *Brown v. Petrolite Corporation*, 965 F.2d 38, 47 (5th Cir. 1992) citing *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988). Malice can be *implied* from the acts and conduct of the wrongdoer *Knight Kitchen Music v. Pineau*, 149 B.R. 239 (D.C. Me. 1993), 23 Bankr. Ct. Dec. 1427 (where the debtor's conduct targets the creditor that will almost certainly cause harm); *Schutz v. Morris*, 201 S.W.2d 144 (Tex. App. – Austin 1947).

c) The injury must be suffered by the creditor or by its interest in property.

The Fifth Circuit has determined that in § 523(a)(6) cases, malice can either be express or implied based on the facts proven, and can be shown by *either* proof of an objective substantial certainty of harm, *or* a subjective motive to cause

harm. *In the Matter of Miller, supra* at 606.[8] The meaning of "malice" as applied to issue preclusion in § 523(a)(6) is controlled by federal law and not state law. *In the Matter of Miller, supra* at pg. 604.

The *Miller* case is controlling precedent. Moreover, *Miller* recognizes that if *implied* malice exists in a § 523(a)(6) case, then that can be sufficient even though there is no proven "bad [or evil] motive" present on the part of the debtor (*i.e.*, an express finding is not required). The court quotes with approval the definition of implied malice from *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977).

> There need be no showing of "*special malice*" toward the injured party, only that the act is done deliberately and intentionally, *in* knowing *disregard of the rights of another.*

(Emphasis added). Importantly, this Court will recall that "special malice" was not required in *McIntyre v. Kavanaugh*, 242 U.S. 138, 141, 37 S. Ct. 38, 61 L. Ed. 205 (1916). Under the facts that were found in this case by the state probate court [Appendix C and D], the state appellate court [Appendix E], and the bankruptcy court [Appendix H], Goldblatt's conduct was determined to have been committed willfully *and* maliciously, whether viewed either by an objective standard or by a subjective standard.

To be sure, Goldblatt contends that he was not part of the conspiracy, *in spite of the fact* that he authored and signed

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[8] A contrary holding can be found in *Markowitz v. Campbell* (In re Markowitz), 190 F.3d 455, 464 (6th Cir. 1999), and *Carrillo v. Su* (In re Su), 290 F.3d 1140, 1145 (9th Cir. 2002) which rejects the objective standard.

the very document by which all of the other state court defendants acted [Appendix E, pg. 57]. The May 30, 1994 Agreement provides that one of the conspirators' express purposes was for Goldblatt, acting as a Trustee for the other defendants, to re-acquire in Goldblatt's name, the business as an operating company [Appendix E, pg. 53],[9] that A&W had already purchased for $323,000.00 [Appendix E, pg. 66]. Mr. Goldblatt actively worked for this stated goal of re-acquiring the business and to frustrate A&W's intention to purchase the related real estate (a deferred phase in the Asset Purchase Agreement) that A&W occupied as a lessee of its landlord WNT.

Thus, Goldblatt *intended* that A&W suffer the harm that was planned and took overt, targeted, methodical steps to carry out this plan [Appendix D, pg. 24, ¶27]. By definition, these proven actions constitute malice since Mr. Goldblatt knew that A&W had paid the estate executors $323,000 for the assets and that A&W had taken other active steps to try and finalize the purchase of the real estate. *See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995).

Under Texas law, one of the required elements for the imposition of exemplary damages is that the court must find that the actor committed either fraud, *malice*, or a willful act or omission. Tex. Civ. Prac. & Rem. Code § 41.003(a) (Vernon 1997). Malice is defined in § 41.001(7). Mr. Goldblatt satisfied the state statute under both prongs of

---

[9] "The parties agree that the purpose of this Agreement is two fold: First, to recover Wilbert of North Texas, Inc. intact as an operating company owned by Kenn Goldblatt, Trustee."

the subjective or objective test that has been established by the Fifth Circuit.

In re Performance Nutrition, Inc., 239 B.R. 93, 115 (N.D. Tex. 1999), 42 Collier Bankr. Cas. 2d 1652, involved claims of breach of fiduciary duty, tortious interference with contract relations, and civil conspiracy. Judge Abramson discussed the awarding of exemplary damages when such acts are found and stated:

> Malice has been defined in case law as "ill-will, spite, evil motive, or purposing the injury of another." Armendariz, 553 S.W.2d at 407. However, the Texas statute governing exemplary damages provides a much more extensive definition of malice. Under the Texas statute, malice is defined as "a specific intent by the defendant to cause substantial injury to the claimant; or . . . *an act or omission . . . which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and . . . of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.*" Tex. Civ. Prac. Rem. Code § 41.001 (Vernon 1998).

Id., 239 B.R. at 115-16 (emphasis in the original).

The language in the Texas statute is the *same* standard that is currently used in the Fifth Circuit to determine if the

debt in question is dischargeable, or exempt from discharge under § 523(a)(6).

Because the judgment against Goldblatt contains an award of exemplary damages then it follows that the state trial court and the state court of appeals found *affirmative* evidence in the record that showed the existence of malice. If that evidence did not exist, then the exemplary damage award could not have been upheld against Goldblatt. As bankruptcy Judge Houser noted in her Memorandum Opinion [Appendix H, pg. 128 – 129], the state probate court expressly found that:

> Goldblatt "wrongfully and intentionally conspired to inflict injury on A&W," *see* Judgment, p. 2, ¶ 5 [Appendix C, pg. 13];
>
> A&W entered into the Commercial Lease Agreement attached as Exhibit "A" to the Agreement for Acquisition of Assets on the closing date of October 28, 1991, *see* Findings, p. 4, ¶ 15 [Appendix D, pg. 22];
>
> A&W substantially performed under the terms of the Obligation to Purchase provision of the Commercial Lease Agreement, *see* Findings, p. 5, ¶ 20 [Appendix D, pg. 22];
>
> Wilbert and/or James Day and Ramona Day as the Independent Co-Executors of the Estate of Tommy Joe Day breached the terms of the Obligation to Purchase provision of the Commercial Lease Agreement entered into between A&W and Wilbert by terminating

negotiations and refusing to sell the Leased Premises to A&W at a price to be determined by appraisers, *see* Findings, pg. 5, ¶22 [Appendix D, pg. 23];

The breach of the Obligation to Purchase provision of the Commercial Lease Agreement between A&W and Wilbert was a result of a conspiracy to commit fraud among the following parties [including Goldblatt] to prevent A&W from being able to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . . , *see* Findings, p. 5, ¶ 23 [Appendix D, pg. 23];

The purchase of the Real Estate Lien Note from Landmark Life and subsequent foreclosure by Kenn Goldblatt of the Leased Premises was the result of a conspiracy to commit fraud among the following parties [including Goldblatt] to divest A&W of its right to purchase the Leased Premises in accordance with the terms of the Obligation to Purchase provision of the Commercial Lease Agreement . . . , *see* Findings, p. 6, ¶ 25 [Appendix D, pg. 23 – 24];

The following parties [including Goldblatt] were engaged in a conspiracy to defraud A&W evidenced in part by a written Agreement to cooperate to void the Agreement for Acquisition of Assets between A&W and Wilbert, and divest A&W of the assets it rightfully purchased from Wilbert . . . , *see* Findings, p. 6, ¶ 27. [Appendix D, pg. 24].

As can be seen, Judge Houser did not disagree with, question, or disturb these findings, but relied upon them when she entered her Order and Judgment. In addition, in discussing the evidence in the record the state court of appeals also held, *inter alia*,

> Findings of fact entered in a case tried to the court have the same force and dignity as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). [Appendix E, pg. 50].
>
> Thus, Goldblatt attempted to acquire 100% of WNT and the deed to the Dawn Lane property via the May 1994 agreement, and he contended at trial that he owned 100% of WNT. This evidence shows that all of the parties to the 48th Court lawsuit and the May 1994 agreement – Shirley, Indian Villages, the Klutz Trust, WNT, James, Ramona, and Goldblatt – agreed to make it impossible for WNT to sell the Dawn Lane property to A&W and fraudulently orchestrated the granting of the 48th court judgment to accomplish that [illegal] objective. This evidence further supports the trial court's conclusion that these appellants conspired to fraudulently void the asset acquisition agreement. [Appendix E, pg. 53 – 54].
>
> Because all of the appellants signed agreements with Goldblatt on the same day that would enable Goldblatt to recover WNT's assets and the Dawn Lane property, despite the existence of the 352nd court judgment, the trial court could reasonably

have *inferred* that all of the appellants conspired to commit a fraud upon the 48th court to prevent A&W from purchasing the Dawn Lane property in accordance with the terms of the commercial lease agreement. (emphasis added). [Appendix E, pg. 57 – 58].

As an appellate court, we must give effect to the trial court's *intended* findings if they are supported by the evidence, the record, and the judgment. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 (Tex. 1992). This rule is based upon well settled Texas law that in a nonjury trial every reasonable *inference* and intendment supported by the record will be drawn in favor of the trial court's judgment. *Id*. As we have discussed, there is ample evidence to support the trial court's *implied* findings that George and Shirley conspired to commit fraud. Further, fact findings on the ultimate and determinative fact questions of a case are not to be disregarded simply because they are mislabeled as conclusions of law. *McAshen v. Cavitt*, 149 Tex. 147, 229 S.W.2d 1016, 1020 (1950); *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585, 587 (Tex. App. – Eastland 1990, writ den.). We overrule all of appellant's issues concerning conspiracy. (emphasis added). [Appendix E, pgs. 60 – 61].

There is, however, ample evidence to support the trial court's conclusions that the breach of the obligation to purchase provision in the commercial lease agreement resulted from the

> appellants' conspiracy to commit a fraud upon the 48th District Court and that appellants are jointly and severally liable for any damages caused by their conspiracy. We have discussed this evidence at length in addressing appellants' challenges to the trial court's conclusions regarding conspiracy. *If appellants had not conspired to commit fraud, the commercial lease agreement would not have been breached, and A&W would not have suffered damages because of the breach.* The trial court's judgment awards A&W $150,000 in damages that were caused by the breach. Findings that the breach and the damages were the direct result of appellants' conspiracy may be *implied* from the above conclusions and this damage award. *See* Tex. R. Civ. P. 299 (providing that trial court's findings of fact shall form the basis of its judgment and that, when one or more elements of a ground of recovery have been found by the trial court, omitted, unrequested elements, when supported by the evidence will be *supplied* by presumption in support of the judgment); *see also Jefferson County v. Sterk*, 830 S.W.2d 260, 262 (Tex. App. – Beaumont 992, writ denied) . . .

(Emphasis added). [Appendix E, pgs. 80 – 81].

The state court of appeals clearly held under the facts proved, that Goldblatt's acts were willful, and objectively intended to harm the property interest of A&W with malice that was inferred from his conduct. That determination was supported by the proof that was adduced by A&W as part of its summary judgment record. It has been said that Mr. Goldblatt was the party most responsible since he was

the person who drafted the written agreement dated May 30, 1994 that bound all of the judgment debtors together and which was the central evidence that proved the elements of the conspiracy. In the state court of appeals' opinion it was stated:

> Moreover, in this case, Goldblatt, at the very least, had full knowledge of all the details of the conspiracy. Once a conspiracy is proven, each co-conspirator is responsible for all acts done by any of the conspirators in furtherance of the unlawful combination. *Carroll*, 592 S.W.2d at 926; *McWhorter*, 993 S.W.2d at 787. Accordingly, appellants are all responsible for each other's acts committed in furtherance of the conspiracy.

[Appendix E, pg. 59]

Issue Preclusion.

The full faith and credit statute requires federal courts to accord a state court judgment the same preclusive effect that the judgment would have in a state court.[10] *Marrese v. Amer. Acad. Of Orthopaedic Surgeons*, *supra*; *Migra v. Warren City School Dist. Bd. Of Educ.*, *supra.* By definition, the doctrine of issue preclusion precludes the relitigation of an *issue* that has been actually and necessarily litigated and determined in a prior action. The doctrine does not permit a

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[10] 28 U.S.C. § 1738 provides that "The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken."

party to relitigate the *facts* that make up the *elements* of that issue, as that would constitute a collateral attack on a prior judgment. *Gober v. Terra + Corporation (In re Gober)*, 100 F.3d 1195, 1201 (5th Cir. 1996), 11 Bankr Ct. Rep. 31.

> Under Texas law, collateral estoppel 'bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based on the same cause of action. *Bonniwell v. Beach Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). Before applying collateral estoppel, the court must determine that the facts asserted in the second proceeding were fully and fairly litigated in the first, that the facts were essential to the judgment, and that the parties were cast as adversaries in the first action. *Id.* (citing Restatement (Second) of Judgments, § 27 (1982)).

All of these elements were satisfied by A&W in this case. *See also In re Limbaugh*, 155 B.R. 952, 956, 7 Tex. Bankr. Ct. Rep. 254 (N.D. Tex. – Dallas 1993) (opinion by J. McGuire). *Cycles, Ltd. v. Navistar Financial Corporation*, 37 F.3d 1088, 1090 (5th Cir. 1994); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1991 (5th Cir. 1982). A federal court lacks jurisdiction to entertain collateral attacks on prior state court judgments under the *Rooker-Feldman* doctrine.[11]

The bankruptcy court correctly found and concluded that issue preclusion could properly be applied in this case under

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[11] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 444 S. Ct. 149, 68 L. Ed. 362 (1923); *Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983).

the precepts of *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991), and *State Farm Fire and Cas. Co. v. Fullerton*, 118 F.3d 374, 383 (5th Cir. 1997)(quoting *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801 n. 7 [Tex. 1994]) [Appendix H, pg. 126].

Goldblatt fully litigated his defenses in state court to all of A&W's claims. Those claims or issues were determined against him by a lawful and final judgment. Thus, it is *impermissible* (as well as disingenuous) for Goldblatt to now assert in this court that:

> (1) the state court judgment was "factually flawed and legally erroneous." or
>
> (2) that his actions against A&W were due to "just cause or excuse." or
>
> (3) that the findings in the trial court judgment does not support the requirements of § 523(a)(6)." or
>
> (4) that the bankruptcy court relied on Texas law rather than federal bankruptcy law in determining that the debt was non-dischargeable.

The bankruptcy court properly gave Mr. Goldblatt due consideration for each of his claims and defenses to A&W's complaint and properly determined that they did not have merit, and were not established. Consequently, there is no purpose in revisiting those failed defenses again in this proceeding.

III. The Petition Does Not Merit Discretionary Review

Goldblatt's application for writ of certiorari does not merit review by this Honorable Court as the decision below is not in a real or direct conflict with a decision of another Circuit. The bankruptcy court's decision has not departed from the accepted and usual course of judicial proceedings that would require this Court's supervisory power. Further, the bankruptcy court's decision has not decided an important federal question in a way that conflicts with other relevant decisions of this Court. Supreme Court Rule 10.

While Goldblatt attempts to complain of imagined error, due to adverse decisions by the state trial court and the bankruptcy court, in the end those decisions were lawfully and correctly made by Judges who had the power to make those decisions in trials or hearings that afforded Goldblatt all rights to which he was entitled. The process was fair, both procedurally and substantively, and was not unconstitutional. Goldblatt had his day in court, and the lower court decisions were decided correctly in accordance with applicable law.

The United States Supreme Court is not in the business of error correction, as that is the express function of the Court of Appeals. There are no "compelling reasons" that have been set out in Goldblatt's Petition that warrant review by this Court. Supreme Court Rule 10. The case may be important to Goldblatt, but it does not decide an issue that is important to the jurisprudence of the United States, or the Circuit Courts of Appeal.

As to the question of whether the decision by the bankruptcy court that was affirmed by the court of appeals,

presents a real, *direct* conflict with the other circuits,[12] A&W would show the following:

The Fifth Circuit allows proof of willful and malicious acts under a two-pronged test. The injured party must establish that the injury that was sustained was based on either a *subjective* motive to act willfully and maliciously, or an *objective* substantial certainty of harm. Satisfying either prong in this test can result in a finding of willful and malicious conduct for intentional injury under the Court's holding in *Kawaauhau v. Geiger.*[13] The first part of the prong rests on the actor's state of mind, while the second prong can be established in the face of an actor's protestations that he had no evil motive or ill will, but that his actions are substantially certain to, in fact, cause injury or harm to the other party because they are a natural and probable consequence of that conduct. *Kawaauhau* resolved the conflict between the Eighth Circuit and the Sixth and Tenth Circuits by approving the holding in the Eighth Circuit. The holding in *Kawaauhau* does not say that objective findings are disapproved, or not allowed. However, Mr. Goldblatt wants to put a gloss on that holding so that *Kawaauhau* would require a narrow, constricted application, as suggested by the Ninth and Tenth Circuits. The latter circuits require that the actor's subjective state of mind must know that harm will follow, or that it is substantially certain to follow from the actor's intentional conduct, before the debt is excepted from discharge. *Carrillo v. Su,*[14] and *Moore v. Panalis.*[15]

12. Supreme Court Rule 10(a).

13. *Miller* at pg. 603.

14. 290 F.3d 1140 (9th Cir. 2002).

15. 357 F.3d 1125 (10th Cir. 2004).

In the first place, the *Miller* case was decided in 1998, while the *Carrillo* and *Moore* cases were decided very recently. Thus, *Carrillo* and *Moore* are the cases which conflict with Miller, and not the other way around. Second, both cases involved either a traffic accident or a claim for misrepresentation as to whether insurance coverage existed concerning the claimant's oil field injury. Neither case had anything to do with whether the debtor willfully and maliciously intended to injure the creditor, as is true in this case. Here, there is an active, targeted conspiracy by Goldblatt and others to defraud A&W out of the business it lawfully purchased from Wilbert for $323,000. For Goldblatt to claim that he had "legal justification" to perform these wrongful acts is the epitome of chutzpah.

The Fifth Circuit Court's objective standard is simply a recognition as to the efficacy of the role that a fact finder can play in resolving factual disputes that are at the heart of the ultimate issue of willfulness and malicious acts that intentionally injure the creditor. The shallow analysis that Mr. Goldblatt offers as to the holdings in the other circuits does not demonstrate that any real conflict exists between either the Fifth Circuit and the Sixth, Ninth, and Tenth Circuits.

The last paragraph of Supreme Court Rule 10 expressly provides:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Neither circumstance is true in this case. But, even if the point were conceded (which it is not), such matter does not constitute grounds for granting the writ in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed herein by Petitioner be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 04-1053

In the

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT

Petitioner,

v.

A&W INDUSTRIES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY

A&W has come to a forum in which ultimate and momentous decisions turn on minute facts and delicate shades of the meanings of words and asks the Court to disregard the flagrant errors of the courts below by cobbling together misleading allegations and unsupported conclusions. Its "take our word for it" argument is unworthy of serious consideration by this Court.

The *Chutzpah* Issue

A&W claims Goldblatt's "legal justification" arguments are "the epitome of *chutzpah*" – without seriously addressing them. Instead, it makes much of the fact that A&W paid $325,000.00 for business assets.[1] [E, 32].[2] What it does not say is that A&W was ***never*** a *bona fide* purchaser for value as shown by the original trial record and documents before the Court. [E, 27-28]. Testimony at trial showed that a competing bidder would have paid *$1.8 million* for assets if the Estate's and WNT's employees and fiduciaries had not colluded to keep them from making their offer. [E, 29, 35-36]. But most important, A&W's principals testified at trial that they were aware of the dispute concerning the company's ownership and real estate at the time they purchased them. E, 64 (fn.7), 66, and 78]. Now they would have the Court believe that the efforts by the Estate's executors to recover their looted assets were conspiratorial and without justification. The record shows otherwise.

In defining *chutzpah* in the context of American jurisprudence it is important to note, as a court in the federal district of New Jersey did in 1995, that "Legal

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[1] In actual fact, A&W's principals paid only $25,000.00 each, borrowing the balance which was paid out of the profits of the business.

[2] In the interest of space, all citations to appendices are cited as "[appendix letter, page number(s)]"

chutzpah is not always undesirable, and without it our system of jurisprudence would suffer." *Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164 (D.N.J.,1995). That is particularly true in this case, in which significant public policy issues reverberate.

Argument Without Anchor

A&W recites "facts" without placing them within any chronological context.

It is true that the Executors refused to sell the subject real estate to A&W in November, 1993. [E. 36]. It is unstated that A&W had ceased making rental payments and was forcing the property into foreclosure prior to that time. [E. 37]. It is untrue that Goldblatt had anything to do with the Executors' decision, since he was not involved in any way until February, 1994.

It is true that Shirley Long Day sued the Executors in the 48th District Court in January 1994 for breach of the Agreed Judgment in the 352nd District Court (of December 1992). [E. 37] It is not true that Goldblatt was a party to either lawsuit, or had anything to do with either action, and met Shirley Long Day only in April 1994 when he began to arrange the family settlement agreement[3] that resulted in the May 30 Agreement(s).

A&W fails entirely to mention that it sued Goldblatt in 141st District Court on March 27, 1994 [E. 38], after he had purchased the mortgage note but before he had met Shirley Long Day or any other participant in the May 30, 1994 Agreement or made any investigation of the WNT asset sale that he found to be so flawed that both attorneys representing the executors and WNT and WNT's

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[3] It is noteworthy that the state appeals court rejected Goldblatt's claims that the May 1994 Agreement was a Family Settlement Agreement because "none of the parties to the May 1994 agreement were beneficiaries of Tommy's will." In fact, documents before that court showed that every adult heir ratified the Agreement with notarized signature and each had a financial stake in the outcome.

CPA paid the limits of their malpractice insurance policies before the end of trial. Once he discovered that A&W was not a *bona fide* purchaser for value of the assets and that the Estate's and WNT's fiduciaries were apparently liable for malpractice claims, he proceeded in his own defense. A&W would have this Court believe that he is not permitted to do so. Was he simply to capitulate to A&W rather than establish a vigorous defense to which he is obviously entitled?

No reasonable person would contend that facts exist outside their chronological context. Yet that is precisely what A&W would have this Court believe. "What did he know and when did he know it?" is as valid an inquiry for this case as it was for one with much broader historical implications.

Conclusions Without Facts

This entire case rests on a hopelessly flawed trial court judgment that decreed "conspiracy" without finding an essential element required by law to do so. In Texas, a civil conspiracy must include an illegal act by a conspirator. A&W would have this Court believe that an apparently false statement by Shirley Long Day in an affidavit supporting her summary judgment motion in the 48th District Court constitutes a fraud on that court. No judicial decree exists finding that to be true. Instead, the state appeals court said "*If* this was the case, her allegations of damages in the 48th court lawsuit were completely false." [emphasis added] [E, 52]. But in the *same* Opinion recognized that the trial court had never declared the 48th court judgment void as it surely would have done if it had declared it to be a fraud on the court. [See E. 92 (fn. 17)]. The Opinion simply declared that "While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment." [E, 96 (fn. 18)]. If A&W was not "bound," A&W could not be "damaged."

The state appeals court had similar problems affirming the judgment when it was forced to "imply" findings that were not made by the trial court. [E, pp. 60, 62, 80, 81 and 111. See also 130]. Such action is not permitted of a Texas appeals court that can only "unfind" facts, not find them. But, the appeals court misquoted the very authority it was citing ("Courts of Appeals can only 'unfind' facts, not make original findings of fact, and exceeds its authority when it implies a finding of actual damages in tort." *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986)) by omitting the final compound phrase. Perhaps that is why it ordered its Opinion to remain unpublished. [See E, 90.]

Erroneous and Misleading Legal Interpretation

A&W makes no substantive legal analysis of the case law, but simply argues that the Court should not consider the substantive points of law and legal theories Goldblatt's Writ has raised.

The "By the Debtor" Inquiry

A&W's position is both inconsistent and confusing with regard to the Bankruptcy statute which it encourages the Court to disregard. A&W makes no mention of the fact that it judicially admitted in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits in the Bankruptcy Court that it "has never claimed that the defendant [Goldblatt] engaged in either negligent, unlawful or criminal behavior." [G, 116]. Its entire argument holds Goldblatt responsible for the alleged acts of others –acts that rest at best on tenuous legal grounds.[4]

Goldblatt has pointed out to the Court that no Federal case has ever held a co-conspirator liable under 523(a)(6) unless there was specific evidence of the

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[4] See E, 80. See also E, 63: The trial court did not conclude that Goldblatt . . . breached the obligation to purchase agreement."

debtor's actual participation in a willful and malicious act. A&W has failed to provide a single controverting case to this argument. Instead it rails about state law requirements and applications that are inapposite to this inquiry.

Similarly, A&W's claim that "the circuit court of appeals reviewed the entire record before it" is misleading and unsupportable. [Appendix M, p. 151]. The one paragraph, *per curiam*, unpublished Opinion makes no such statement.[5]

So far, A&W has been successful at asking the courts below to impute the actions of others to Goldblatt, and they have erroneously done so. It is for this Court to correct these obvious errors.

The "Correct" Legal Standard

Similarly, A&W asks the Court to assume Goldblatt's actions in the absence of any proof on the record. "Must have", "could have", "should have" are not elements of any standard of proof required under 523(a)(6). There is no question that Goldblatt took actions: to purchase a note that was available in the marketplace and predated A&W existence, to protect himself from A&W's precipitously filed lawsuit of March 1994, to protect his investment, and to investigate the claims of A&W's lawsuit. None of those actions were (or are) illegal. None were intended to harm A&W nor were directed toward intentionally damaging A&W.

A&W wants the Court to forget the single controlling issue of this entire decade of litigation: A&W ***never*** had a right to purchase the real estate. A&W wants the Court to overlook the fact that its contract was contingent upon the lessor obtaining clear title to the property. A&W wants the Court to overlook the state appeals court's recognition that "The record indicates,

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[5] It is indicative of the confused nature of the jurisprudence of this case that both state and Federal appeals courts withheld publication of their opinions

however, that this cloud was not removed," [E, p. 34 (fn.4)] thus never triggering that contingency.

The Bankruptcy Court correctly concluded that civil conspiracy is an "intentional tort" but failed to analyze its essential nature as a "derivative tort." Civil conspiracy, the Bankruptcy Court recognized, can only be found in conjunction with "one or more overt unlawful acts." [Appendix H, p. 134] See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App.Dallas, 2002). "Willful injury" comes from the underlying tort, not from the conspiracy itself. If Goldblatt did not commit the underlying tort (which was not even found by the trial court) he cannot be held non-dischargeable under 523(a)(6).

Misleading Citations to the Record

A&W makes much of what it characterizes as the "findings" of the state trial court and unpublished appeals court Opinion upon which the bankruptcy court relied. In doing so, it consistently attempts to mislead the Court by mischaracterizing the nature of those quotations. To wit:

"Findings, p. 5, ¶ 22" is a Conclusion of Law, and does not mention Goldblatt.

"Findings, p. 5, ¶ 23" is a Conclusion of Law.

"Findings, p. 6, ¶ 23-24" is a Conclusion of Law (particularly unsupported by other actions of the trial court in its refusal to set aside Goldblatt's foreclosure or to grant A&W a constructive trust on the property). The answer is clearly stated in B, p. 9, lines 5-21.

"Findings, p. 6, ¶ 27" is a Conclusion of Law.

"Appendix E, pp. 53-54" illustrates the error of the state appeals court in assuming – in the absence of all evidence – that Goldblatt was a party to the 48th court suit.

"Appendix E, pp. 57-58" demonstrates that inferences were used in place of factual evidence to find conspiracy – an action also impermissible under long-settled Texas law. (We recognize that proof of a conspiracy may be, and usually must be made by

circumstantial evidence, *Jernigan v. Wainer*, 12 Tex. 189 (1854), but vital facts may not be proved by unreasonable inferences from other facts and circumstances, 'No Evidence' and 'Insufficient Evidence.' 38 Texas L. Rev. 359, 363; or, as often been said by this court, a vital fact may not be established by piling inference upon inference. *Rounsaville v. Bullard*, 154 Tex. 260, 276 S.W.2d 791(1955); *Lobley v. Gilbert*, 149 Tex. 493, 236 S.W.2d 121 (1951). To permit proof in this fashion, would violate the rule of *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059 (1898), which requires proof of any vital fact by evidence amounting to something more than a mere scintilla.) See *In re J.L.*, 127 S.W.3d 911 (Tex.App. 2004)

Appendix E, pp. 60-61 demonstrates the state appeals court's impermissible reliance upon "implied" findings. Once again, the text of the quotation indicates the actions of others, not Goldblatt.

Appendix E, pp. 80-81 purports to indicate that breach of contract is a ground for upholding a conspiracy allegation. Under Texas and Federal law, it is not, without an additional, specific tortious action, which the state trial court did not find.

Appendix E, p. 59 purports to indicate Goldblatt had "full knowledge of all of the details of the conspiracy" when the record indicates that he was not involved until months after the breach of contract upon which all other allegations were based. [See E, p. 63 stating that "All appellants conspired to commit the fraud that resulted in the breach" but that "the trial court did not conclude that Goldblatt breached the obligation to purchase agreement."]

Issue Preclusion

A&W makes much of the doctrine of issue preclusion without adequate legal analysis. The fact that 523(a)(6) is a Federal statute, requires that the state findings be reviewed ***in light of*** the Federal statute. See *In re Debtor* (*Miller*), 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998) where the panel declined to rest its summary

judgment on §523(a)(6) because the state court jury had not decided whether Miller had inflicted a "willful and malicious injury." The *Miller* panel reasoned that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. *Kawaauhau*, 118 S. Ct. at 977. The panel avoided equating §523(a)(6) torts and intentional torts, saying ". . . . Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful." Yet this is precisely what A&W is asserting to this Court and what the bankruptcy court did.

Because the state court findings did not speak to Miller's fraudulent intent or the objective probability of injury from tortious acts, the panel found the parties were free to try the issue for the first time and reversed and remanded. Identically, the state court findings do not speak to Goldblatt's state of mind and A&W's judicial admission confirms that Goldblatt made no action at all that would sustain objection to discharge under 523(a)(6).

A&W's claim that "the state appeals court clearly held under the facts proved, that Goldblatt's acts were willful and objectively intended to harm the property interest of A&W with malice that was inferred from his conduct" is both logically impossible and factually flawed because it relies upon the breach of contract (in which Goldblatt was not involved in any manner) and the 48th court suit (to which Goldblatt was not a party). A&W wants this Court to ignore its judicial admission that Goldblatt committed no "act" against A&W and to hold him responsible for the acts of others at times prior to when he was involved with them, when that is clearly not the law under 523(a)(6).

The "Legal" Difference

A&W assumes wrongly that the legal bases of collateral estoppel for Texas conspiracy law and Federal bankruptcy law under 523(a)(6) are identical. But Goldblatt's Writ established for the Court that they are not.

Under Texas conspiracy law, co-conspirators can be held liable for the actions of other co-conspirators. But the very language of 523(a)(6) makes an entirely different legal requirement, specifically requiring an act "by the debtor."

This Court's original analysis of the statute in *Kawaauhau* demonstrates the type of analysis required. There it analyzed both the nuance of the language and the intent of Congress in drafting that language to determine that a debtor's conduct must be both willful ***and*** malicious.

Here, a similarly closely-reasoned analysis is required as to whether the drafters intended the "by the debtor" language to include acts of others in whatever context. Goldblatt's Writ has already demonstrated that the federal courts in every circuit in which 523(a)(6) has been considered have concluded that they clearly did not.

There is a seminal difference between the state and Federal laws that precludes collateral estoppel.

This Court spoke to that very issue in *Commissioner v. Sunnen* when it stated that "even where the specified elements of collateral estoppel are present, reexamination of a legal issue is appropriate where there has been a change in the legal landscape after the decision claimed to have preclusive effect." Restatement (Second) of Judgments § 28 (cmt. c). This is particularly so "when . . . . there has been change in the law but not the facts." *Commissioner v. Sunnen*, 333 U.S. 599-600 (1948) as quoted in *Faulkner v. National Geographic Enterprises Inc.*, 04-0263 (2nd Cir. 03/05/2005).

Various cases discussed in Goldblatt's Writ demonstrate the changing (and conflicting) interpretations of 523(a)(6). A&W's risible and disingenuous assertion that this Court need not concern itself with conflicts between other circuits and the 5th Circuit is as curious as it is self-serving. Goldblatt believes that it is precisely the function of this Court to provide "equal justice" by maintaining the consistency of analysis and application of the laws in all circuits.

Goldblatt's Writ amply demonstrates that there are circumstances requiring reversal of the bankruptcy court's exception to discharge. A&W would have this Court believe that the issues are identical when they clearly are not, and that they conform to the teachings of the authorities when they clearly do not. Appeals courts must determine whether the state appellate court "has made specific, subordinate, factual findings on the ***identical dischargeability issue in question*** – that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue . . . ." [Emphasis added] *Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 278 (5th Cir. 1994). Clearly, an act "by the debtor" required by 523(a)(6) could not have been found by the bankruptcy court in light of A&W's judicial admission that Goldblatt personally committed no act that could have damaged A&W and the conflicting, flawed and erroneous findings of the state courts.

A&W erroneously claims that this case does not present an issue that is important to the jurisprudence of the United States. In fact, the kernel issue contained in this case is of substantial importance to every circuit. If Goldblatt's debt can be excepted based on the conduct of others, bankruptcy courts will be flooded with bogus "conspiracy" allegations in efforts to obfuscate and avoid the narrow requirements of 523(a)(6) that the act be "by the debtor." In a political climate where debtors have fewer and fewer alternatives for the new start that is the foundation of bankruptcy law, this case, and the implications springing from it, represents an important public policy issue.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari with separate Appendix has been served on A&W Industries, Inc.'s Attorney of Record, Mr. Frank R. Jelinek, Esq. at 801 East Abram, Suite 102, Arlington, Texas 76010, on March 14, 2005, via first class mail.

Frank P. Hernandez